81-2060

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CASE NO.

in the Supreme Court of the United States

October Term, 1981

LAND & LEISURE, INC., et al.,
Petitioners,

vs.

ROGER L. SUMMER, et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

April 29, 1982

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QUESTIONS PRESENTED FOR REVIEW

I

DOES THE TRIAL COURT HAVE DISCRETION TO DETERMINE AS A MATTER OF LAW WHEN THE STATUTE OF LIMITATIONS BEGINS TO RUN IN A FEDERAL SECURITIES FRAUD CLAIM?

II

WHERE SEVEN YEARS PRIOR TO THE COMPLAINT FOR ALLEGED SECURITIES FRAUD, THE CORPORATE DEFENDANT STOPPED FILING ANNUAL PUBLIC REPORTS AND DISTRIBUTING STOCKHOLDER REPORTS, AND THE VALUE OF ITS STOCK DROPPED BY EIGHTY PERCENT, CAN THE PLAINTIFF'S CONCLUSORY ALLEGATIONS OF DUE DILIGENCE PRECLUDE A DISMISSAL BASED ON THE STATUTE OF LIMITATIONS?

PARTIES

This petition is filed by the following defendants/appellees:

Land & Leisure, Inc., a Florida corporation[1]
Guy B. Bailey
Areca S. Bailey
Guy B. Bailey, Jr.
Charlotte Babcock

The following were also parties in the Court of Appeals:

Plaintiff/appellant:

Roger L. Summer

Defendants/appellees:

Arthur Young & Co.
Raymond James Associates, Inc.
Jerome Grossman
Robert Fischer
Robert Little (deceased)

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[1]The following Florida corporations are affiliates of Land & Leisure:

United Resources, Inc.
Country Club of Miami Corporation
G.B.B. Investments, Inc.
R.S. Investment Corporation

Arthur Young & Co. and Raymond James Associates, Inc., have filed or are filing with this Court separate petitions.

(Footnote 1 Continued)

KGS Marine, Inc.
Phillips International
Marine Motor Sales, Inc.
Phillips Hardware Sales, Inc.
Atgar Development Corporation
Section 3 Property Corp.
U.R.I. Strawberry Hills Corporation
U.R.I. Harbor Point #1 Corporation
U.R.I. Harbor Point #2 Corporation
U.R.I. Hotel Corporation
Sunshine Utilities Company, Inc.
Area Utilities Maintenance Corporation
Section 2 Property Corp.
Section 11 Property Corp.
Section Two Venture Corporation
Patio Villas Development Corp.
Country Club of Miami Realty, Inc.
Country Club Center
URI Centers, Inc.
URI Centers of Nevada, Inc. (a Nevada corporation)
C & D Enterprises, Inc. (a Nevada corporation)

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
PARTIES	ii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	2
JURISDICTION	2
STATUTES INVOLVED	3
STATEMENT OF THE CASE	5
REASONS FOR GRANTING THE WRIT	10

TABLE OF AUTHORITIES

Case	Page
Berry Petroleum Co. v. Adams & Peck, 518 F.2d 402 (2nd Cir. 1975)	12
Buder v. Merrill, Lynch, Pierce, Fenner and Smith, 644 F.2d 690 (8th Cir. 1981)	16
Conley v. Gibson, 355 U.S. 41 (1967)	10
Cook v. Avien, Inc., 573 F.2d 685 (1st Cir. 1978)	17
Gaudin v. KDI Corp., 576 F.2d 708 (6th Cir. 1978)	12
Goldstandt v. Bear Stearns & Co., 522 F.2d 1265 (7th Cir. 1975)	12, 17
Herm v. Staford, 663 F.2d 669 (6th Cir. 1981)	12
Hupp v. Gray, 500 F.2d 993 (7th Cir. 1974)	12, 17
Jablon v. Dean Witter and Co., 614 F.2d 677 (9th Cir. 1980)	16
Jones v. Ford Motor Co., 599 F.2d 394 (10th Cir. 1979)	12

TABLE OF AUTHORITIES (Continued)

Case	Page
Klein v. Bower, 421 F.2d 338 (2nd Cir. 1970)	12, 17
Klein v. Shields & Co., 470 F.2d 1344 (2nd Cir. 1972)	12
Robertson v. Seidman & Seidman, 609 F.2d 583 (2nd Cir. 1979)	12
State of Ohio v. Peterson, Lowry, Rall, Barber & Ross, 651 F.2d 687 (10th Cir. 1981), *cert. denied*, 102 S. Ct. 392 (1981)	12, 16
Townsend v. Columbia Operations, 667 F.2d 844 (9th Cir. 1982)	16
United States v. Kubrick, 444 U.S. 111 (1979)	11

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

OPINIONS BELOW

The opinion of the court of appeals is reported: *Summer v. Land & Leisure, Inc.*, 664 F.2d 965 (5th Cir. 1981). The opinion of the United States District Court, Southern District of Florida, is unreported (but is included in the Appendix).

JURISDICTION

The United States Court of Appeals for the Fifth Circuit (Unit B) entered its order affirming in part, reversing in part, and remanding, on December 28, 1981, and denied rehearing on January 29, 1982. Jurisdiction is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

Florida Statutes §517.21 (1977) (Florida's "Blue Sky" act) (repealed by Laws 1978, c. 78-435, §5, eff. November 1, 1978):

> . . . provided, that no action shall be brought for the recovery of the purchase price after two years from the date of such sale. . . .

Florida Statutes §95.11(5)(d) (1973) (replaced 1975, *see infra*):

> Actions other than those for the recovery of real property can only be commenced as follows:
>
> * * *
>
> (5) within three years.—
>
> * * *
>
> (d) an action for relief on the ground of fraud, the cause of action in such case not to be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud.

Florida Statutes §95.11(3)(j) (1981) (Laws 1974, c. 74-382, §7, eff. January 1, 1975):

Actions other than for recovery of real property shall be commenced as follows: . . .

* * *

(3) within four years.—

* * *

(j) a legal or equitable action founded on fraud.

STATEMENT OF THE CASE

PROCEEDINGS BELOW

In 1978, Roger L. Summer ("Summer") sued Land & Leisure, Inc. ("Land & Leisure"), Guy Bailey, Areca S. Bailey, Guy Bailey, Jr., Charlotte Babcock (collectively, "the Baileys"), Arthur Young and Co., Raymond James Associates, Inc., Jerome Grossman, Robert Fischer, and Robert Little, claiming $54,000 in actual damages and $540,000 in punitive damages arising out of his purchase in 1971 through 1973 of stock in Land & Leisure. Summer's nine-count complaint sought damages under the federal securities statutes, 15 U.S.C. §§78j(b), 77k, 77l(2), and 77q, the Florida "Blue Sky" statute, Fla. Stat. Ch. 517, and Florida common law. As noted by the court of appeals:

> [M]ore than seven years elapsed between the first purchase of stock and the filing of the complaint, and more than five years passed from the last purchase of stock and the filing of the complaint.

664 F.2d at 965.

On motions by the various defendants under Rule 12(b), Fed.R.Civ.P., the district court held Summer's claims barred on the face of his complaint, and therefore dismissed his action with prejudice.

On appeal, the United States Court of Appeals for the Fifth Circuit (a) affirmed the dismissal of Summer's claims under Sections 11 and 12(2) of the Securities Act of 1933, 15 U.S.C. §77k and 77l(2); (b) reversed the

dismissal of Summer's Rule 10b-5 claims with respect to all defendants except Arthur Young and Raymond; and (c) affirmed the dismissal with respect to Arthur Young and Raymond, but directed that Summer be granted leave to amend on remand.

STATEMENT OF THE FACTS

Summer alleges that, between June 24, 1971, and January 3, 1973, he purchased $54,000 worth of Land & Leisure stock in reliance on a Land & Leisure prospectus dated June 17, 1971. The district court ruled that Summer's own complaint, filed in 1978, showed conclusively that by 1971 or 1972, Summer knew sufficient facts which in the exercise of due diligence would have led to the discovery of his cause of action:

> Plaintiff, in his Complaint, alleged that defendants failed to send annual reports or call annual shareholders meetings, as well as failing to supply plaintiff with financial information requested . . . . Plaintiff knew in 1971 and 1972 of the defendants [sic] failure to send reports or have the shareholders meetings, and was aware of the sharp decline in the value of the stock . . . . Inasmuch as it appears from the face of the Complaint that plaintiff was aware of facts which would have disclosed the alleged fraud and therefore due diligence is absent, the Court finds that plaintiff's §10(b) and 10b-5 claims are barred.

The Fifth Circuit, however, ruled that other allegations in the complaint could show due diligence or concealment sufficient to toll the statute of limitations:

> The allegations throughout the complaint which would establish appellant's due diligence or concealment of facts by the corporate defendants fall into three categories: (1) that the defendants conspired to fail to file required reports with the Securities and Exchange Commission, to fail to file and mail stockholders reports and proxy statements, and to fail to call annual stockholders meetings; (2) that defendants attempted to lull appellant by telling him that reports on L&L's financial condition would be forthcoming and that all was well with L&L; and (3) that defendants conspired to prevent the appellant from learning the true condition of the corporation by denying appellant access to corporate books and records, by falsely advising appellant that records had been lost or were unavailable, and by making false entries in the books and records. Appellant asserts, as a consequence of these actions, he did not reasonably discover the existence of the claims until 1977.

664 F.2d at 968-969.

The complaint alleges (¶30) that Land & Leisure failed to hold a shareholders' meeting at any time after 1971. The complaint further alleges (¶41) that at directors' meetings in October and December, 1971, and February, 1972, the directors discussed inaccuracies in the 1971 prospectus, which they failed to disclose; that after

United Resources, Inc., bought a controlling interest in Land & Leisure in February, 1972, the new directors (the Baileys) failed to disclose inaccuracies in the 1971 prospectus. The complaint then alleges (¶41(l)) that the Baileys and Robert Fischer

> took affirmative action to prevent your Plaintiff from learning anything at all about the true condition of the Defendant LAND & LEISURE through the means and instrumentalities of interstate commerce, including the mails and telephonic communication, whereby they represented to your Plaintiff on numerous occasions that reports on the financial condition would be forthcoming, that all was well with the defendant LAND & LEISURE, and that annual meetings of shareholders as well as SEC reports would be forthcoming, when in truth and fact, they, and each of them, knew or should have known in the exercise of ordinary care that such was not the case.

The complaint continues (¶41(m)) that Summer did not learn the true facts until he filed a state court action in October, 1977, to obtain access to the corporate books and records, and that after obtaining access, Robert Fischer,

> aided and abetted by others whose names are presently unknown to your Plaintiff, attempted to prevent your Plaintiff from learning the true condition of the Defendant LAND & LEISURE by hiding records from your Plaintiff, by removing records supplied to the Plaintiff and hiding same, by deliberately and/or

negligently causing false entries to be made in the books and records of the Defendant LAND & LEISURE and by deliberately advising your Plaintiff that certain books and records were lost or destroyed when in truth and fact the same were in the possession, custody and control of the Defendant LAND & LEISURE, or its officers, employees or agents.

REASONS FOR GRANTING THE WRIT

I

DOES THE TRIAL COURT HAVE DISCRETION TO DETERMINE AS A MATTER OF LAW WHEN THE STATUTE OF LIMITATIONS BEGINS TO RUN IN A FEDERAL SECURITIES FRAUD CLAIM?

Summer knew in 1971 the very facts he now claims as "concealment": that Land & Leisure stopped holding annual stockholders' meetings, stopped filing or mailing any reports to stockholders, and suffered a precipitous decline in stock value. Yet, Summer did nothing until October, 1977, when he did what he could have done in 1971—sued Land & Leisure to obtain access to its books and records.

The Fifth Circuit, however, held that Summer's conclusory allegations of due diligence aimed to toll the statute of limitations presented a jury question (although expressing "no opinion as to whether the record in the instant case on remand will develop such that the due diligence issue can be resolved on summary judgment, or whether a full trial will be necessary," 664 F.2d at 970), and, relying on *Conley v. Gibson*, 355 U.S. 41, 45-46 (1967), reversed the dismissal of Summer's claim.

The Fifth Circuit's decision subverts the liberal pleading requirements under the federal rules to defeat the very purpose of the statute of limitations: to avoid vexatious prosecution of stale litigation.

As this Court stated, albeit in another context (medical malpractice), in *United States v. Kubrick*, 444 U.S. 111, 122, and 124 (1979):

> Statutes of limitation, which "are found and approved in all systems of enlightened jurisprudence," represent a pervasive legislative judgment that it is unjust to fail to put the adversary on notice to defend within a specified period of time and that "the right to be free from stale claims in time comes to prevail over the right to prosecute them." These enactments are statutes of repose; and although affording plaintiffs what the legislature deems a reasonable time to present their claims, they protect defendants and the courts from having to deal with cases in which the search for truth may be seriously impaired by the loss of evidence, whether by death or disappearance of witnesses, fading memories, disappearance of documents, or otherwise.
>
> * * *
>
> If he fails to bring suit because he is incompetently or mistakenly told that he does not have a case, we discern no sound reason for visiting the consequences of such error on the defendant by delaying the accrual of the claim until the plaintiff is otherwise informed or himself determines to bring suit.
>
> * * *

> [I]f in this complicated malpractice case, the statute is not to run until the plaintiff is led to suspect negligence, it would be difficult indeed not to apply the same accrual rule to medical and health claims arising under other statutes and to a whole range of other negligence cases arising under the Act and other federal statutes, where the legal implications or complicated facts make it unreasonable to expect the injured plaintiff, who does not seek legal or other appropriate advice, to realize that his legal rights may have been invaded.
>
> [citations omitted]

The courts of appeals have often expressed the view (or assumed) that the running of the statute of limitations on a Rule 10b-5 claim is a question for the jury (although many of those same courts have affirmed defense summary judgments or dismissals on the question).[2]

In *State of Ohio v. Peterson, Lowry, Rall, Barber & Ross*, 651 F.2d 687 (10th Cir. 1981), *cert. denied*, 102 S.Ct. 392 (1981), however, the Tenth Circuit reviewed the origins and development of the federal equitable

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[2]*See, e.g.*, Herm v. Staford, 663 F.2d 669, 682-683 (6th Cir. 1981); Robertson v. Seidman & Seidman, 609 F.2d 583, 591 (2nd Cir. 1979); Jones v. Ford Motor Co., 599 F.2d 394 (10th Cir. 1979); Gaudin v. KDI Corp., 576 F.2d 708, 712 (6th Cir. 1978); Goldstandt v. Bear Stearns & Co., 522 F.2d 1265 (7th Cir. 1975); Berry Petroleum Co. v. Adams & Peck, 518 F.2d 402 (2nd Cir. 1975); Hupp v. Gray, 500 F.2d 993 (7th Cir. 1974); Klein v. Shields & Co., 470 F.2d 1344 (2nd Cir. 1972); Klein v. Bower, 421 F.2d 338 (2nd Cir 1970).

tolling doctrine and concluded that where the facts are sufficiently persuasive, the district judges have the discretion to decide the issue "in the manner of chancery":

> In view of the equitable origin of the tolling doctrine, we think there remains some room for discretion by the court on the issue of plaintiff's discovery and diligence in cases under §10(b) when the pleadings show that the action would be time-barred but for the equitable doctrine. . . .
>
> Limitations rules have traditionally been cast in terms of a prohibition on the *commencement* of an action. In addition to the general policy favoring repose and the quieting of titles, the statute seeks to relieve defendants of the cost and vexation of protracted litigation and the uncertainty of contingent liabilities. Not only defendants but also the courts have an interest in the timely commencement of actions. The adjudication process is hampered by stale evidence and absent witnesses; the burden on court calendars will instantly increase if actions now time-barred were revived by a new statute or tolling rule.
>
> *Any rule which makes the statute of limitations necessarily a jury question defeats the statute's purpose of preventing trials of stale claims.* The need to avoid vexatious litigation is especially acute in cases under §10(b) involving public misrepresentations in the sale of publicly traded securities, an area of the law which readily engenders multiple

> lawsuits arising out of the same underlying transactions. Contingent liabilities due to unfiled claims create special problems when they involve corporations with publicly traded securities. These problems are compounded by a tolling rule which effectively neutralizes the statute of limitations.
>
> Where, as here, a §10(b) action alleges substantially the same facts as in prior litigation, summary disposition is appropriate if the documents before the court clearly and convincingly persuade the trial judge that plaintiff in the exercise of reasonable diligence would have discovered the fraud at such a time as to bar the action.

651 F.2d at 693-694 (additional emphasis added).[3]

In the case below, the Fifth Circuit held that the question was one for the jury, which the district court could not decide on a motion to dismiss. Petitioners submit that to permit a plaintiff to disguise his manifest lack of due diligence behind conclusory allegations of concealment defeats the very purpose of the statute of

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[3]The court further held that an unsuccessful act of concealment does not toll the statute of limitations:

> [W]e see *no reason why an act of concealment by defendant should excuse plaintiff from his obligation of diligence, which he owes the court as well as his adversaries.*
>
> [emphasis added]

Id.

limitations: to avoid stale litigation. This Court should therefore accept jurisdiction and hold, as the Tenth Circuit has held, that the district courts have discretion to hold Rule 10b-5 claims time barred where the facts are sufficiently persuasive.

II

WHERE SEVEN YEARS PRIOR TO THE COMPLAINT FOR ALLEGED SECURITIES FRAUD, THE CORPORATE DEFENDANT STOPPED FILING ANNUAL PUBLIC REPORTS AND DISTRIBUTING STOCKHOLDER REPORTS, AND THE VALUE OF ITS STOCK DROPPED BY EIGHTY PERCENT, CAN THE PLAINTIFF'S CONCLUSORY ALLEGATIONS OF DUE DILIGENCE PRECLUDE A DISMISSAL BASED ON THE STATUTE OF LIMITATIONS?

Even if the statute of limitations in securities fraud claims is to remain within the exclusive province of the jury, the decision below impermissibly permits a plaintiff to abuse liberal pleading requirements and create a paper issue where there is none.

Summer says he was defrauded in 1971 through 1973 by a 1971 prospectus. Summer also alleges, however, that beginning in 1971, Land & Leisure failed to file quarterly and annual reports with the SEC (itself a violation, according to Summer), failed to provide Summer with annual reports, failed to hold annual shareholders' meetings, and refused Summer's requests for financial

information. And, it was public knowledge that the bottom had fallen out of Land & Leisure stock in 1972.

In spite of these facts, Summer did nothing until 1977; and in 1977, prompted only by what he had known since 1971, he did only what he could have done in 1971: he sued in state court to obtain access to the books and records. His own tardy diligence (in 1977) caused him to file this suit, but whatever made him believe in 1977 that he might have a cause of action, he knew in 1971.

The Fifth Circuit held that these facts were insufficient to dismiss Summer's claim under Rule 12(b)(6). If permitted to stand, this precedent would permit any plaintiff with an expired claim but a clever lawyer to harass his putative defendants through years of litigation, delaying the inevitable adjudication that the statute of limitations has run.

This precedent should not be permitted to stand. Summer's knowledge in 1971 was as a matter of law, at the very least, sufficient to put him on "inquiry notice." Had he then exercised due diligence, he would have discovered whatever he claims to have discovered in 1977 when he finally did exercise due diligence. *See State of Ohio v. Peterson, et al.*, 651 F.2d at 694; *Townsend v. Columbia Operations*, 667 F.2d 844, 850 (9th Cir. 1982) (statute of limitations begins to run when plaintiff has "inquiry notice"); *Buder v. Merrill, Lynch, Pierce, Fenner and Smith*, 644 F.2d 690, 693 (Fla. 8th Cir. 1981) ("the totality of the information received" held sufficient to "excite inquiry" in plaintiff; the statutory period " 'need not await his 'leisurely discovery of the full details' regarding his claim' "); *Jablon v. Dean Witter and Co.*,

614 F.2d 677, 682 (9th Cir. 1980) (defense summary judgment affirmed on statute of limitations where "a reasonably prudent person" would have realized defendant's predictions of stock value increase were incorrect); *Cook v. Avien, Inc.*, 573 F.2d 685, 697 (1st Cir. 1978) (data held "sufficient storm warnings to alert a reasonable person to the possibility that there were either misleading statements or significant omissions . . ."); *Goldstandt v. Bear, Stearns & Co.*, 522 F.2d 1265, 1269 (7th Cir. 1975) (due diligence required plaintiff to obtain independent legal advice); *Hupp v. Gray*, 500 F.2d 993, 996 (7th Cir. 1974) (dismissal affirmed, where deposition in related suit gave plaintiff opportunity to discover true facts; "at the very least, the circumstances should have aroused suspicion or curiosity on the part of plaintiff . . ."); *Klein v. Shields & Co.*, 470 F.2d 1344, 1347 (2nd Cir. 1972) (dismissal affirmed, where "at least the possibility of fraud should have been apparent to appellant; and the opportunity to inquire further . . . of course was available").

The Fifth Circuit has simply delayed the inevitable conclusion that Summer's action is barred by the statute of limitations. Summer will not be able to overcome his own allegations.

CONCLUSION

For these reasons, this Court should grant the petition for writ of certiorari.

DATED: April 29, 1982
Miami, Florida

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
UNIT B
(Former Fifth Circuit case, Section 9(1)
of Public Law 96-452—October 14, 1980.)

Cases Nos. 79-2429, 80-5297

ROGER L. SUMMER,

Plaintiff-Appellant/Appellee,

—v.—

LAND & LEISURE, INC., *et al.*,

Defendants-Appellant/
Cross-Appellants.

Before GODBOLD, Chief Judge, FRANK M. JOHNSON, Jr. and ANDERSON, Circuit Judges.

R. LANIER ANDERSON, III, Circuit Judge:

On February 23, 1978, appellant Roger L. Summer (referred to as "Summer" or "plaintiff" or "appellant") filed this complaint in the United States District Court for the Southern District of Florida. Subject matter jurisdiction was predicated on alleged violations of the federal securities laws; however, several state law claims were also asserted under the district court's pendent jurisdiction. Summer was an investor in Land & Leisure, Inc. ("L&L"). Between June 24, 1971, and January 3, 1973, he purchased, in eleven installments, a total of 9,500 shares of L&L common stock at a total cost of

approximately $54,000. L&L stock did not fare well over the years. In his complaint, Summer alleges a conspiracy or scheme among the several defendants to defraud investors and to conceal the fraud. Count I of the complaint alleges a claim under §10(b) of the Securities and Exchange Act of 1934, 15 U.S.C.A. §78j(b), and Rule 10(b)-5 of the Securities and Exchange Commission; Counts II and VI allege claims of common law fraud; Counts III, IV and V allege claims under §§11, 12(2), and 17 of the Securities Act of 1933, 15 U.S.C.A. §§77k, 77l(2) and 77q; Count VII alleges a claim under the Florida Blue Sky Law, Fla. Stat. §§517.21 and 517.301; Count VIII is a state claim of mismanagement and breach of fiduciary duties by corporate officers and directors; and Count IX is a state law claim for breach of the corporate opportunity doctrine. Defendants are Land & Leisure, Inc., and Guy B. Bailey, Guy B. Bailey, Jr., Areca Stone Bailey, Charlotte Babcock, Robert Little, Jerome Grossman, and Robert Fischer, who were at one time or another officers or directors or both of L&L; and Raymond James Associates, Inc. ("Raymond"), the lead underwriters for L&L; and the accounting firm of Arthur Young & Co. which prepared the registration statement and prospectus for L&L. We sometimes refer to all defendants collectively as "defendants." We sometimes refer to all defendants except Arthur Young and Raymond as the "corporate defendants," i.e., the corporation, Land and Leisure, Inc., and its several officers or directors. Defendants moved to dismiss the complaint for failure to state a claim upon which relief could be granted. Fed. R. Civ. P. 12(b)(6). The district court granted the motion as to all the claims under federal law on the ground that they were barred on their face by the applicable statutes of limitations and, as there were no pending federal

questions, exercised its discretion to dismiss the claims under state law. Furthermore, the district court determined that the complaint was frivolous and awarded attorney's fees and costs in favor of the defendants, except Little, in the aggregate amount of $32,480. *See* §11(e) of the Securities Act of 1933, 15 U.S.C.A. §77k(e).

I. Applicable Statutes of Limitations for Claims Under the Federal Securities Laws

Our first task is to determine the applicable statutes of limitations for the federal securities claims. We note that more than seven years elapsed between the first purchase of stock and the filing of the complaint, and more than five years passed from the last purchase of stock and the filing of the complaint.

A. The Section 10(b) Claims.

Since §10(b) of the 1934 Act, 15 U.S.C.A. §78j(b), provides no statute of limitations, we look to the most analogous state statute of limitations. Under Florida law, Fla. Stat. §517.21, provides for a two-year statute of limitations on actions for violations of Florida securities laws. *See Nortek, Inc. v. Alexander Grant & Co.*, 532 F.2d 1013 (5th Cir.), *rehearing denied*, 536 F.2d 624 (1976). Section 517.21 was repealed on July 1, 1976, by Chapter 76-168, §3 of the Laws of Florida of 1976. *See Vigman v. Community National Bank & Trust Co.*, 635 F.2d 455, 460 n. 10 (5th Cir. 1981). Fla. Stat. §95.-11 (5)(d) (amended 1975) provides for a three-year statute of limitations on actions for fraud. *See Vigman v. Community National Bank & Trust Co., supra.* We note that §95.11(5)(d) was changed from three to four years on January 1, 1975. *See Vigman v. Community National Bank & Trust*

Co., 635 F.2d at 460 n. 11. The district court applied the four-year statute. Since the last sale was on January 3, 1973, and since the complaint was filed on February 23, 1978, which is more than four years, the district court concluded that plaintiff's §10(b) and Rule 10(b)-5 claims were barred. We need not decide which of the foregoing statutes of limitations apply in this case. Even assuming that the longest, the four-year statute, applies, it is clear that plaintiff's §10(b) and Rule 10(b)-5 claims are barred, in the absence of circumstances which would toll the statutes.

B. The Section 17 Claims.

With respect to the claims under §17 of the 1933 Act (a portion of Count III), the appropriate state statute of limitation also governs. *See Aldrich v. McCulloch Properties, Inc.*, 627 F.2d 1036 (10th Cir. 1980); *Newman v. Prior*, 518 F.2d 97 (4th Cir. 1975). The district court correctly applied to the §17 claims the same analysis as for the Section 10(b) and Rule 10(b)-5 claims. *See Nortek, Inc. v. Alexander Grant & Co., supra; Turner v. Lundquist*, 377 F.2d 44 (9th Cir. 1967). Accordingly, the §17 claims are also barred, unless the period was tolled.

C. The Section 11 and Section 12(2) Claims.

Sections 11 and 12(2) of the 1933 Act, 15 U.S.C.A. §§77k and 77l(2) (a portion of Count III, Count IV and Count V), however, are governed by the limitation period contained in §13 of the 1933 Act, 15 U.S.C.A. §77m, which provides:

> No action shall be maintained to enforce any liability created under §77k or §77l(2) of this

> title unless brought within one year after the discovery of the untrue statement or the omission, or after such discovery should have been made by the exercise of reasonable diligence, . . . In no event shall any such action be brought to enforce a liability created under §77k . . . of this title more than three years after the security was bona fide offered to the public, or under §77l(2) of this title more than three years after the sale.

The district court held that the passage of more than three years between the alleged wrongful act and the commencing of this action is an absolute bar to the claims under §§11 and 12(2), *i.e.*, the normal rules of tolling do not apply after three years. Appellant does not seriously contest this ruling and it is consistent with a view of the majority of the courts to consider the question. *See Brown v. Producers Livestock Loan Co.*, 469 F.Supp. 27 (D. Utah 1978); *Turner v. First Wisconsin Mortgage Trust*, 454 F.Supp. 899 (E.D. Wis. 1978); *Cowsar v. Regional Recreations, Inc.*, 65 F.R.D. 394 (M.D. La. 1974). The Tenth Circuit has interpreted the almost identical language in the Interstate Land Sales Full Disclosure Act to constitute an absolute bar. *Aldrich v. McCulloch Properties, Inc.*, 627 F.2d at 1042-43. *But see In re Home-Stake Production Co. Securities Litigation*, 76 F.R.D. 337 (N.D. Okl. 1975). The Court in *Turner v. First Wisconsin Mortgage Trust, supra*, rejected the plaintiff's argument that the three-year period could be tolled by the defendant's concealment of the claim. "Otherwise [§13] would create a limitation period for all suits of one year from the time discovery of the untrue statements or omissions should have been made, and the three-year provision would serve no purpose

at all." 454 F.Supp., at 911. We find this reasoning convincing. We hold that the normal tolling rules are not applicable to toll the three-year period. Accordingly, we hold that appellant's claims under §11 and §12(2) are absolutely barred and affirm the district court's dismissal of those claims.

II. Did Appellant Allege Sufficient Facts Which Would Toll the Statute of Limitations on the §10(b) and §17 Claims?

While we relied upon state law for the appropriate statue of limitations, federal law determines "when the clock starts to running" for purposes of the statute of limitations. *See Azalea Meats, Inc. v. Muscat*, 386 F.2d 5, 8 (5th Cir. 1967). "Under federal law, a cause of action under §10(b) and Rule 10(b)-5 . . . accrues when the aggrieved party has either actual knowledge of the violation or notice of facts, which, in the exercise of due diligence, would have led to actual knowledge thereof." *See Vigman v. Community National Bank & Trust Co.*, 635 F.2d at 459. Appellant claims that by the exercise of due diligence he did not discover the claims now asserted until 1977, within one year before the complaint was filed, and well within the appropriate statute of limitations whether it be two, three or four years.

We turn to the allegations of the complaint, particularly those of concealment of the facts by the defendants, which would tend to establish that plaintiff exercised due diligence in discovering the claims which he now asserts. The allegations throughout the complaint which would establish appellant's due diligence or concealment of facts by the corporate defendants fall

into three categories:[1] (1) that the defendants conspired to fail to file required reports with the Securities and Exchange Commission, to fail to file and mail stockholders reports and proxy statements, and to fail to call annual stockholders meetings; (2) that defendants attempted to lull appellant by telling him that reports on L&L's financial condition would be forthcoming and that all was well with L&L; and (3) that defendants conspired to prevent the appellant from learning the true condition of the corporation by denying appellant access to corporate books and records, by falsely advising appellant that records had been lost or were unavailable, and by making false entries in the books and records. Appellant asserts, as a consequence of these actions, he did not reasonably discover the existence of the claims until 1977.

We are mindful of the standard for ruling on a Rule 12(b)(6) motion: "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of this claim which would entitle him to relief," *Conley v. Gibson*, 355 U.S. 41, 45-6, 78 S.Ct. 99, 101-02, 2 L.Ed.2d 80 (1957). In granting the defendants' motion

[1]The allegations of concealment are not contained within each and every count of the complaint; however, the allegations are contained at various points in the complaint. We believe it would be contrary to the liberal reading which we must give to a complaint upon motion to dismiss to consider the allegations of concealment only as to those counts in which the allegations are set forth. Having made such allegations with respect to some counts, and there being a reasonable inference that the allegations would likewise apply to the other counts, we surely cannot conclude that it appears beyond doubt that plaintiff can prove no set of facts which would entitle him to relief.

to dismiss the complaint pursuant to Rule 12(b)(6), the district court held, as a matter of law, that the plaintiff was aware of facts which would have disclosed the alleged fraud. The facts relied upon by the district court were only three: first, Summer's knowledge that the defendant corporation did not hold annual stockholders' meetings; second, his knowledge that the defendant corporation did not send out annual stockholders' reports; and third, his knowledge of the sharp decline in the value of the stock.

With respect to the decline in the price of the Land and Leisure stock, we note that the bulk of Summer's purchases occurred after the substantial price decline, and that all the purchases were made through the underwriter, Raymond. It is a reasonable inference from the pleadings that the independent accounting firm, Arthur Young, continued to provide accounting services throughout the relevant time, including in particular after the time of the substantial price decline. If the price decline did not put the accounting firm and the underwriter on notice, it is a reasonable inference that it would not have put Summer on notice. We can conceive of several factual situations in which a price decline, under the circumstances here, would not be indicative of fraud in the least, *e.g.*, a depressed real estate market caused either by tight money or recession.[2]

[2]Defendants cite several in which a plaintiff's knowledge of the declining market price of securities has been a factor indicating that plaintiff had knowledge of facts which should have led to the discovering of the fraud. However, these cases apparently involved misrepresentations relating to the value of the securities—*e.g.*, that the investment would produce a stable income with no risk—so that sharp declines in value shortly after such misrepresentation would in fact tend to indicate that the representation was false. *See Buder v. Merrill Lynch, Pierce, Fenner & Smith, Inc.* 644 F.2d

With respect to the failure to send annual stockholders' reports and hold annual stockholders' meetings, none of the defendants have cited any case, nor have we found one, which holds that the mere failure to send such reports or hold such meetings is sufficient to put an investor on notice of facts which in the exercise of due diligence would have led to actual knowledge of fraud.[3]

In the present posture of this case[4]—a Rule 12(b)(6) dismissal—the three facts relied upon by the district court are simply not sufficient to justify a conclusion that "it appears beyond doubt that the plaintiff can prove no set of facts" which would adequately explain

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(Footnote 2 Continued)

690 (8th Cir. 1981); *Koke v. Stifel, Nicolaus & Co.*, 620 F.2d 1340 (8th Cir. 1980); *Jablon v. Dean Witter & Co.*, 614 F.2d 677 (9th Cir. 1980); and *Hupp v. Gray*, 500 F.2d 993 (7th Cir. 1974). In the instant case, a decline in market price is not inconsistent with the representations complained of nor otherwise suggestive of the fraud alleged.

[3]Arthur Young's reliance upon *Cook v. Avien, Inc.*, 573 F.2d 685 (1st Cir. 1978), is misplaced. *Cook* did not hold that failure to hold a stockholder's meeting constituted notice. In *Cook*, a stockholders' meeting was in fact held, and plaintiff would have become aware of the misrepresentations had plaintiff attended. *Id.* at 696, n. 22. Nevertheless, the First Circuit declined to adopt an inflexible rule imputing such knowledge to a shareholder who did not attend the meeting, rather, the court held only that the failure to attend was one factor to be weighed adversely to plaintiff's diligence. *Id.* at 695, n. 21.

[4]We note that most of the cases relied upon by the defendants were appeals from summary judgments rather than 12(b)(6) dismissals. The plaintiffs were allowed to support their claim with matters outside the pleadings.

why plaintiff did not become suspicious. In fact, Summer has made significant allegations tending to explain his lack of suspicion and tending to support his allegation of due diligence. As against all defendants, Summer has alleged generally a conspiracy to fraudulently conceal from plaintiff the material facts. As against the corporate defendants, Summer specifically alleged misrepresentations on numerous occasions that reports of financial condition would be forthcoming, that all was well with the defendant Land and Leisure, and that annual meetings would be forthcoming. In addition, Summer alleged that he was denied access to records, and that there were attempts to prevent him from learning the true financial condition by hiding records, removing records, making false entries in records, and misrepresenting that records were also lost or destroyed. Accordingly, we hold with respect to all defendants, except Arthur Young and Raymond, that the district court erred in dismissing plaintiff's complaint pursuant to Rule 12(b)(6). In *Azalea Meats, Inc. v. Muscat*, 386 F.2d 5 (5th Cir. 1967), we stated:

> We disagree, however, with its disposition of the issue of due diligence on motions for summary judgment.
>
> Recognizing that "* * * the question whether a party had sufficient opportunity, so that in the exercise of reasonable diligence he would have discovered the facts forming the basis of his cause of action, may raise issues of fact which would have to be tried to a jury; * * *", the learned judge, on the facts contained in the record before us, treated it as a question

of law to be determined by the court and arrived at the ultimate conclusion that:

"Considering the depositions, documents and affidavits filed herein, there can be no question that plaintiff was put on notice as to the facts constituting its alleged cause of action no later than early September, 1961." We note in passing that neither of the four cases relied upon by the trial court to support this result involved adjudication upon a motion for summary judgment.

The concept of due diligence is not imprisoned within the frame of a rigid standard; it is protean in application. A fraud which is flagrant and widely publicized may require the defrauded party to make immediate inquiry. On the other hand, one artfully concealed or convincingly practiced upon its victim may justify much greater inactivity. The presence of a fiduciary relationship or evidence of fraudulent concealment bears heavily on the issue of due diligence.

386 F.2d at 9 (footnotes omitted). Of course we express no opinion as to whether the record in the instant case on remand will develop such that the due diligence issue can be resolved on summary judgment, or whether a full trial will be necessary. However, we are confident that it was error to conclude that "it appears beyond doubt that plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. at 45-6, 78 S.Ct. at 101-02. Accordingly, the dismissal of the complaint was

error with respect to all defendants except Arthur Young and Raymond.

Because the district court concluded that Summer had knowledge of facts which should have led to his discovery of the fraud, the district court did not address the subsidiary argument of Arthur Young and Raymond that the complaint contains only conclusory allegations as against those two defendants. We agree with Arthur Young and Raymond that the complaint includes only conclusory allegations of fraudulent concealment as against Arthur Young and Raymond. Rule 9(b), Fed. R. Civ. P., requires that the elements of fraud be pleaded with particularity. Accordingly, we affirm the judgment of the district court to the extent it dismissed the complaint with respect to Arthur Young and Raymond, but we hold that on remand Summer be granted leave to amend to assert more particularized allegations as against Arthur Young and Raymond, if he can do so. See 2A Moore's Federal Practice, ¶9.03 (indicating that dismissal for failure to comply with Rule 9(b) is almost always with leave to amend).

III. The Other Issues on Appeal

Our disposition necessarily supplants the district court's determination that the complaint was without merit and that the defendants were entitled to attorney's fees. We therefore vacate the award of attorney's fees, which also makes it unnecessary for us to address the issues on cross-appeal relating to the amount of attorney's fees. Likewise, we reinstate the pendent state claims.

IV. Conclusion

We affirm the district court's dismissal of the §11 and §12(2) claims against all defendants. As against all defendants except Arthur Young and Raymond, we reverse the district court's dismissal of the §10(b) and Rule 10(b)-5 claims and the §17 claims and remand for further proceedings not inconsistent with this opinion. As to Arthur Young and Raymond, we affirm the dismissal of the §10(b) and Rule 10(b)-5 claims and the §17 claims, but direct that leave to amend be granted. The district court's award of attorney's fees is vacated. The pendent state claims are reinstated. All costs of this appeal shall be taxed against appellees.

AFFIRMED IN PART, REVERSED IN PART AND REMANDED.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 78-810-Civ-JAG

ROGER L. SUMMER,

Plaintiff,

v.

LAND & LEISURE, INC., et al.,

Defendants.

ORDER

This cause came before the Court on the various Motions of the defendants to dismiss. This is an action brought pursuant to the Securities Act of 1933, the Securities Exchange Act of 1934, the Florida Blue Sky laws, F.S. 517.21 and F.S. 517.301 and pendent jurisdiction. More specifically, Count 1 of the Complaint is based on §10b of the 1934 Act and Rule 10b-5; Count 2 is based on common law fraud; Count 3 is based on §11 and §17 of the 1933 Act; Court 4 is based on §11 of the 1933 Act; Count 5 is based on §12(2) of the 1933 Act; Count 6 is based on common law fraud; Count 7 is based on F.S. 517.21 and F.S. 517.301; Count 8 is based on the common law of Florida and Count 9 is also based on the common law of Florida.

The Court has carefully reviewed the 40 page Complaint, defendants' Motions to dismiss and the memoranda filed in support of and in opposition to the Motions to dismiss. The Motions to dismiss filed by the

various defendants allege that plaintiff's claims are all barred by the applicable statutes of limitations.

Count 1, as stated, is brought pursuant to §10b of the 1934 Act, and Rule 10b-5. Since the 1934 Act does not have its own statute of limitations, the Court must look to the most closely analagous state statute of limitations, which in this case is F.S. 517.21 which provides a two year limitation period. *Nortek, Inc. v. Alexander Grant & Co.*, 532 F.2d 1013, 1015 (5th Cir. 1976). F.S. 517.21 was repealed, effective January 1, 1975, therefore the Court must apply a different statute subsequent to that date. Applying the statute of limitations for fraud, F.S. 95.11(3), the limitation period would be four years.

The Complaint states that plaintiff purchased an aggregate sum of 9,500 shares of common stock of defendant Land and Leisure. The first shares were purchased on June 24, 1971 and the last purchase was made on January 3, 1973. The Complaint was filed February 23, 1978. Applying the two year limitation period to all but the last purchase, plaintiff's claims for purchases from June 24, 1971 through December 27, 1972 are time barred. Applying the four year limitation period to the last sale on January 3, 1973, this claim is also time barred.

In determining when the clock starts to run for the purpose of applying a borrowed state statute of limitations for a federally created remedy, federal law controls. *Azalea Meats, Inc. v. Muscat*, 386 F.2d 5 (5th Cir. 1967). The statute of limitations in a §10(b) action begins to run from the time a person has actual knowledge or notice of facts which, in the exercise of due diligence,

would have led to actual knowledge of the violation. *Aboussie v. Aboussie*, 441 F.2d 150 (5th Cir. 1971).

The statute of limitations may be tolled by the equitable doctrine of fraudulent concealment. However, in order to invoke the doctrine, a party must have remained ignorant of the fraud without any fault or want of diligence or care on his part. A party may not merely rely on his own unawareness of the facts or law to toll the statute, but must show he has exercised reasonable care and diligence in seeking to learn the facts which would have disclosed the fraud. In other words, the statutory period ". . . [does] not await the appellant's leisurely discovery of the full details of the alleged scheme . . .". *Klein v. Bower*, 421 F.2d 338, 343 (2d Cir. 1970).

Normally the concept of due diligence is one involving factual issues not appropriate for summary treatment. *See Azalea Meats, Inc., supra.* However, where it is clear from the face of the Complaint, plaintiff's own allegations, that plaintiff knew facts which should have put him on notice, dismissal is appropriate. *See Klein v. Bower, supra; Berry Petroleum v. Adams & Peck*, 518 F.2d 401, 412 (2d Cir. 1975).

Plaintiff, in his Complaint, alleged that defendants failed to send annual reports or call annual shareholders meetings, as well as failing to supply plaintiff with financial information requested. Defendants argue that these facts were sufficient to place plaintiff on notice and to preclude application of the tolling doctrine. Plaintiff knew in 1971 and 1972 of the defendants failure to send reports or have the shareholders meetings, and was

aware of the sharp decline in the value of the stock. Plaintiff contends that this is an issue for trial.

As stated previously, plaintiff's §10(b) and 10b-5 claim is barred by the limitation statutes, unless the statutes are tolled. Inasmuch as it appears from the face of the Complaint that plaintiff was aware of facts which would have disclosed the alleged fraud and therefore due diligence is absent, the Court finds that plaintiff's §10(b) and 10b-5 claims are barred.

Counts 3, 4 and 5 are brought pursuant to §11, 12(2) and 17 of the 1933 Act. As to §17 of the Act, the state statute of limitations applies and as discussed with regard to Count 1, the action pursuant to §17 is also barred by that state statute of limitations. Actions brought pursuant to §11 and 12(2) are governed by the statute of limitations set forth in §13 of the 1933 Act which provides that an action must be brought within one year after discovery should have been made by the exercise of due diligence and further provides that nothing under §11 or 12(1) shall be brought more than 3 years after the security was bona fide offered to the public or under §12(2) within 3 years of the sale. As previously stated, the last sale in issue was on January 3, 1973 and plaintiff at that time was aware of facts which would have lead to discovery of the untrue statements alleged to have been made. Accordingly, the tolling doctrine cannot apply and the actions brought pursuant to §11 and 12(2) of the 1933 Act are barred by the statute of limitations set forth in §13 of the Act.

Counts 2, 6, 8 and 9 based on common law fraud are before the Court pursuant to pendent jurisdiction. Inasmuch as the federal claims are barred by the statutes

of limitations, these counts based on pendent jurisdiction must also be dismissed. Count 7 based on the Florida Blue Sky laws must be dismissed because the federal claims are barred and pendent jurisdiction does not exist. Furthermore, the claims based on F.S. 517.21 and F.S. 517.301 are also barred by the statute of limitations.

Accordingly, it is

ORDERED and ADJUDGED that defendants' Motions to dismiss are granted and this cause is hereby dismissed as barred by the statutes of limitations and lacking pendent jurisdiction.

DONE and ORDERED at Miami, Florida on this 2nd day of May, 1979.

/s/Jose A. Gonzalez, Jr.
DISTRICT JUDGE

cc: all counsel

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION
CASE NO. 78-810-Civ-JAG

ROGER L. SUMMER,

Plaintiff,

vs.

LAND & LEISURE, INC.,
GUY BAILEY, SR.,
GUY BAILEY, JR.,
ROBERT LITTLE,
JEROME GROSSMAN,
ARECA STONE BAILEY,
CHARLOTTE BABCOCK
ARTHUR YOUNG & COMPANY,
RAYMOND, JAMES ASSOCIATES, INC.
and ROBERT R. FISCHER.

COMPLAINT

Plaintiff, by and through his undersigned attorneys, sues Defendants, and as grounds therefor alleges:

Jurisdiction and Venue

1. This action arises under Section 5(b)(2) of the Securities Act of 1933, 15 U.S.C. §77e (the "Act"); §11 of the Act, 15 U.S.C. §77k; §12(2) of the Act, 15 U.S.C. §77l; §17 of the Act, 15 U.S.C. §77q; §10b of the Securities Exchange Act of 1934, 15 U.S.C. §78(b) ("Exchange Act"), Securities and Exchange Commission ("SEC"),

Rule 10(b)5, 17 C.F.R. §240.10b-5, and under the statutory and common law of the State of Florida.

2. This Court has jurisdiction of this action pursuant to §22 of the Act, 15 U.S.C. §77u, §27 of the Exchange Act, 15 U.S.C. §78aa, and pursuant to the provisions of 28 U.S.C. §1331. This Court has pendent jurisdiction of so much of this action as is based upon State law pursuant to the principles of law enunciated by the United States Supreme Court in *Hurn v. Ousler*, 289 US 238, and *United Mine Workers of America v. Gibbs*, 89 Sup.Ct. 1130 (1966).

3. The amount in controversy exclusive of interests and costs exceeds $10,000.

4. In furtherance of the wrongs complained of below Defendants, directly and indirectly, used the means and instrumentality of interstate commerce, including the mails, and telephonic communication devices.

The Parties

5. Plaintiff, ROGER L. SUMMER (hereinafter called "Plaintiff") is over the age of 21 years and resides in and is a citizen of the State of Florida.

6. The Defendant, LAND & LEISURE, INC., hereinafter "LAND & LEISURE") is a corporation organized and existing under the laws of the State of Florida, with its principal place of business in Miami, Dade County, Florida.

7. The Defendants, GUY BAILEY, SR., GUY BAILEY, JR., and ROBERT LITTLE, upon information

and belief, are each over the age of 21 years, and are each citizens of the State of Florida, and reside within the jurisdiction of the United States District Court for the Southern District of Florida. At all times material herein these Defendants were officers and/or directors of the Defendant LAND & LEISURE, and functioned in such capacities.

8. Upon information and belief, the Defendant JEROME GROSSMAN is over the age of 21 years, and a citizen of the State of Florida, and resides within the jurisdiction of the United States District Court for the Southern District of Florida.

9. Upon information and belief, the Defendants ARECA STONE BAILEY and CHARLOTTE BABCOCK are each of the age of 21 years, and are citizens of the State of Florida, and reside within the jurisdiction of the United States District Court for the Southern District of Florida. At all times material herein each of the aforementioned Defendants functioned as an officer and/or a director of the Defendant LAND & LEISURE.

10. The Defendant ARTHUR YOUNG & COMPANY (hereinafter "ARTHUR YOUNG"), is a partnership of independent public accountants which conducts its business and practice in most of the principal cities of the United States. Upon information and belief, at all times relevant hereto, Defendant maintained offices in Miami, Dade County, Florida, and performed accounting and auditing services for the Defendant LAND & LEISURE, and further provided such services, expertise, reports, financial statements, and exhibits to Defendant LAND & LEISURE for use in the preparation and filing of LAND & LEISURE's Registration Statement

and amendments thereof, Prospectus for its public offering, and for subsequent period reports to State and Federal regulatory agencies as well as to the management of LAND & LEISURE.

11. The Defendant RAYMOND, JAMES & ASSOCIATES, INC, (hereinafter "RAYMOND, JAMES"), is a corporation organized and existing under the laws of the State of Florida, with its principal place of business in St. Petersburg, Pinellas County, Florida, and at all times relevant hereto was the "lead" or "managing" underwriter of the public offering of the securities of Defendant LAND & LEISURE, beginning on or about June 17, 1971.

12. The Defendant ROBERT R. FISCHER at all times material herein was over the age of 21 years, a citizen and resident of the State of Florida residing in this District, and an officer of Defendant LAND & LEISURE.

13. The securities purchased by the Plaintiff were offered for sale and were sold within this judicial district.

14. Upon information and belief each of the Defendants either: (a) did the things complained of herein; or (b) agreed and conspired to do the things complained of in this Complaint; or (c) aided and abetted each other in doing said things; or (d) at all times material to this action, directly or indirectly controlled and/or was a controlling person of Defendant LAND & LEISURE within the meaning of the Securities Act of 1933 and the Securities Exchange Act of 1934.

COUNT I

Based upon §10(b) of the Exchange Act, and SEC Rule 10b-5, Plaintiff restates and realleges Paragraphs 1 through 14, inclusive, as if more fully set forth herein.

15. The Plaintiff purchased the aggregate sum of 9,500 shares of the common stock of Defendant LAND & LEISURE for a total aggregate consideration of approximately $54,000, on or about the following dates:

Date	Amount
June 24, 1971	$3,000.00
	600.00
July 20, 1971	400.00
August 5, 1971	500.00
August 6, 1971	500.00
October 2, 1972	500.00
October 26, 1972	500.00
November 10, 1972	500.00
November 20, 1972	500.00
December 20, 1972	500.00
December 27, 1972	1,000.00
January 3, 1973	1,000.00

16. Commencing on or about June 17, 1971, and at all times material hereto, LAND & LEISURE aided and abetted by Defendant RAYMOND, JAMES sold to Plaintiff the securities set forth in Paragraph 15 above, which sales were accomplished by the use, directly or indirectly, of means and instrumentalities of interstate commerce, including the mails and telephonic communication.

17. The Defendants LITTLE, GROSSMAN, ARTHUR YOUNG, RAYMOND, JAMES and LAND & LEISURE, and each of them, aided and abetted by one or more of the others, employed one or more devices, schemes, and artifices to defraud Plaintiff in substantially the following manner, as is more specifically set forth in Paragraph below:

(a) Made untrue statements of material facts, and omitted to state material facts necessary in order to make the representations made not misleading in order to induce the Plaintiff to purchase the stock of LAND & LEISURE, as aforesaid; and

(b) Engaged in acts, practices and courses of business which operated as a fraud and deceit upon the Plaintiff; and

(c) Aided and abetted as active participants or negligently acquiesced in, suffered to occur or approved the complained of acts by the other Defendants.

18. The untrue statements of material facts and omissions to state facts necessary in order to make the representations not misleading, were accomplished through the use of a Prospectus for LAND & LEISURE ("the Prospectus"). Attached hereto as Exhibit A is a true and correct copy of the Prospectus as filed with the SEC and sent to the Plaintiff through the mails in connection with the public offering of the common stock of LAND & LEISURE and the purchase thereof by Plaintiff.

19. The Prospectus was false and misleading and contained omissions of material fact necessary in order to make the statements made not misleading as follows:

(a) The Prospectus failed to disclose that one L. R. BROOKS was a controlling shareholder of LAND & LEISURE by virtue of his beneficial ownership of approximately 113,000 shares of stock of the corporation, or 38.4% standing in the name of MURRAY SCHWARTZ, JEROME GROSSMAN and/or ROBERT LITTLE.

(b) The Prospectus failed to disclose that L. R. BROOKS had an indirect controlling interest in LAND & LEISURE by virtue of his ownership of a controlling interest in CORDWELL INTERNATIONAL DEVELOPMENTS, LTD., which company owned beneficially 35.6% of the shares of stock of LAND & LEISURE as of the date of the Prospectus.

(c) The Prospectus failed to disclose that L. R. BROOKS maintained an office on the premises of LAND & LEISURE, and while not designated as an officer, director or managing agent, exercised a controlling influence over the officers and directors of LAND & LEISURE in the day to day operations and management of the company.

(d) The Prospectus omitted to state material facts regarding the company's "WESTVIEW" property necessary in order to make the statements made not misleading, by failing to disclose that the WESTVIEW property comprised of approximately 1000 acres, is under water year round ranging in depth from 2 feet to over 16 feet; that the property lacks access from any road or highway; and that the cost to LAND & LEISURE to drain the property would be approximately $40 million dollars, or five times the value of the property sold at retail to third party purchasers. As a result of the foregoing, property which LAND & LEISURE had purchased for $1,200,000 which received prominent treatment in the Prospectus, was virtually worthless.

(e) The Defendants LITTLE, GROSSMAN, ARTHUR YOUNG, RAYMOND, JAMES and LAND & LEISURE knew or should have known of such false material information contained in this Prospectus at least as early as June 2, 1971 (and possibly as early as March, 1971) by virtue of correspondence dated June 2, 1971 between L. R. BROOKS and Defendant JEROME GROSSMAN, who on said date was Executive Vice President and a Director of Defendant LAND & LEISURE; correspondence dated June 14, 1971 between L. R. BROOKS and Defendant ROBERT LITTLE, who on said date was

President and a Director of Defendant LAND & LEISURE; and by virtue of a Memorandum dated June 23, 1971 between L. R. BROOKS and Defendant ROBERT LITTLE. In addition, upon information and belief, L. R. BROOKS supplied to Defendant LAND & LEISURE at or about the aforementioned dates, a report from GEE & JOHNSON, Surveyors, showing the WESTVIEW land to be worthless.

(f) The Prospectus made further false and misleading statements of material fact by affirmatively stating that all land to be sold to third parties by the Defendant LAND & LEISURE had been registered with the Florida Land Sales Board when in truth and fact 112 units of the 656 units of land to be sold by LAND & LEISURE, or 17% of its inventory, had not been registered with the Florida Land Sales Board. The Prospectus then omitted to state material facts necessary in order to make the statements made therein not misleading when it failed to disclose that the sale by LAND & LEISURE of unregistered land subjected the company to sanctions by the Florida Land Sales Board, including the recision of any and all sales to third parties, which recision would have resulted in the demise of the company.

(g) The Prospectus failed to disclose that LAND & LEISURE's accounting firm, Defendant ARTHUR YOUNG, was owed the sum of $85,000 for past due accounting auditing fees, some incurred as a result of the public offering, and that as a result LAND & LEISURE had pledged Accounts Receivable to ARTHUR YOUNG & COMPANY in the amount of $127,500. The Prospectus further failed to disclose that it was the intention of the Defendant LAND & LEISURE to pay out of the proceeds of the public offering to Defendant ARTHUR YOUNG, the sum of $50,000 as a partial payment on past due accounting and auditing fees.

(h) The Prospectus failed to disclose that at the time of the public offering Defendant LAND & LEISURE had determined that it would not follow through with its commitment to build and develop the CHUCK CONNORS WONDERFUL WEST complex, nor honor its contract with CHUCK CONNORS regarding same, since as of June 2, 1971 (and possibly as early as March, 1971), the Defendant LAND & LEISURE and its officers and directors had become aware of the fraud perpetrated on the company in the purchase of the WESTVIEW property and at the time of the public offering the Defendant LAND & LEISURE needed approximately $400,000 in cash in order to rescind the WESTVIEW purchase. The Defendant

LAND & LEISURE did not have this cash available to it except from the public offering which began on or about June 17, 1971.

20. In reliance upon the said false and misleading Prospectus, Plaintiff purchased the aforesaid shares of stock of LAND & LEISURE, and as a direct and proximate result of the aforesaid wrongful conduct of the Defendants, and each of them, Plaintiff has been damaged in the amount of $54,000.

WHEREFORE, Plaintiff demands judgment jointly and severally against the Defendants ROBERT LITTLE, JEROME GROSSMAN, ARTHUR YOUNG, RAYMOND, JAMES and LAND & LEISURE, in the amount of $54,000, which is the difference between the actual value of said securities and the amount paid therefor by Plaintiff; and further demands attorneys' fees, interests, and the costs of this action.

COUNT II

Based Upon Common Law Fraud

21. Plaintiff restates and realleges Paragraphs 1 through 20, inclusive, as if more fully set forth herein.

22. By reason of the foregoing wrongful conduct, the Defendants ROBERT LITTLE, JEROME GROSSMAN, ARTHUR YOUNG, RAYMOND JAMES, and LAND & LEISURE, and each of them, engaged in a fraud actionable at common law whereby Plaintiff has been damages in the amount of $54,000.

WHEREFORE, Plaintiff demands judgment against the Defendants ROBERT LITTLE, JEROME GROSSMAN, ARTHUR YOUNG, RAYMOND, JAMES, and LAND & LEISURE, jointly and severally, in the amount of $54,000 plus punitive damages in the amount of $540,000, together with interests, costs, and disbursements permitted by law in this action.

COUNT III

Based Upon Sections 11 and 17 of the Securities Act of 1933

23. Plaintiff restates and realleges Paragraphs 1 through 23, inclusive, as if more fully set forth herein.

24. For the purpose of bringing about a sale of the stock of Defendant LAND & LEISURE of the value of $1,600,000 and the sale of collateralized subordinated sinking fund debentures of the value of $2,000,000, the Defendants, LAND & LEISURE, ROBERT LITTLE, JEROME GROSSMAN, ARTHUR YOUNG and RAYMOND, JAMES, prepared or caused to be prepared a Prospectus (attached hereto as Exhibit A) for general distribution among the public and to the Plaintiff who might be induced thereby to purchase said stock and/or debentures.

25. The Prospectus contained the following false and fraudulent statements as well as omissions of material fact necessary in order to make the statements made therein not misleading, regarding the condition and prospects of Defendant LAND & LEISURE:

(a) The Prospectus failed to disclose that one L. R. BROOKS was a controlling shareholder of Defendant LAND & LEISURE by virtue of his beneficial ownership of 113,000 shares of the common stock or 39.4% of the company standing in the name of MURRAY SCHWARTZ, JEROME GROSSMAN, and/or ROBERT LITTLE.

(b) The Prospectus failed to disclose that L. R. BROOKS had an indirect controlling interest in Defendant LAND & LEISURE by virtue of his ownership of a controlling interest in CORDWELL INTERNATIONAL DEVELOPMENT, LTD., which company owned beneficially 35.6% of the shares of stock of Defendant LAND & LEISURE as of the effective date of the Prospectus.

(c) The Prospectus failed to disclose that L. R. BROOKS maintained an office on the premises of Defendant LAND & LEISURE, and exercised a controlling influence over the officers, directors, and managing agents of Defendant LAND & LEISURE, and in truth and fact was responsible for and did control the day to day operations and management of the company.

(d) The Prospectus affirmatively stated false material facts regarding the condition of the Defendant LAND & LEISURE "WESTVIEW" property when it stated

that the property was similar in characteristics to LAND & LEISURE's "WESTFIELD" property and the Prospectus omitted to state material facts necessary in order to make the statements made not misleading regarding the WESTVIEW property, by failing to disclose that the WESTVIEW property, comprised of approximately 1000 acres, was under water at all times ranging in depth from 2 feet to over 16 feet; that said property lacked access from any improved road or highway; and finally that it would cost the Defendant LAND & LEISURE approximately $40 million dollars merely to drain the "WESTVIEW" property, which sum was far in excess of the aggregate projected sales price for the property and as a result, property which had been purchased by LAND & LEISURE for $1,200,000, was in truth and fact utterly worthless.

(e) That the aforesaid Defendants knew or should have known of such facts is apparent by virtue of correspondence dated June 2, 1971, between L. R. BROOKS and Defendant JEROME GROSSMAN, who on such date was Executive Vice President and a Director of Defendant LAND & LEISURE; correspondence dated June 14, 1971, between L. R. BROOKS and Defendant ROBERT LITTLE, who on such date was President and a Director of Defendant LAND & LEISURE, and a

Memorandum dated June 23, 1971, from L. R. BROOKS to Defendant ROBERT LITTLE, who was President and a Director on said date.

(f) The Prospectus made false and misleading statements of material fact by affirmatively stating that all land to be sold to third parties by the Defendant LAND & LEISURE had been registered with the Florida Land Sales Board, when, in truth and fact, 112 units of 656 units, or 17% of the land to be sold by Defendant LAND & LEISURE, had not been registered for resale with the Florida Land Sales Board. The Prospectus omitted material facts necessary in order to make statements made therein not misleading when it further failed to disclose that the resale by Defendant LAND & LEISURE of unregistered land subjected the company to sanctions by the Florida Land Sales Board including by way of example, having to rescind any and all sales to third parties which action would effectively result in the company having to cease doing business.

(g) The Prospectus omitted to state material facts regarding a relationship between Defendant LAND & LEISURE and its accounting firm, Defendant ARTHUR YOUNG, when the Prospectus failed to disclose that as of its effective date Defendant ARTHUR YOUNG was owed

the sum of $85,000 for past due accounting and auditing fees, and that as a result, Defendant LAND & LEISURE had pledged Accounts Receivable to ARTHUR YOUNG in the amount of $127,500. In addition the Prospectus further omitted to disclose the material fact that an agreement had been reached between Defendant LAND & LEISURE and Defendant ARTHUR YOUNG prior to the effective date of the public offering that ARTHUR YOUNG would be paid by Defendant LAND & LEISURE from the proceeds of the public offering. On or about September 7, 1971, Defendant ARTHUR YOUNG was in fact paid $50,000 for accounting fees. notwithstanding the foregoing the Prospectus failed to disclose same at Page 6 under the heading "Use of Proceeds".

(h) The Prospectus made material misstatements of fact when it stated in the "Business Section" at Page 17, that it intended to use part of the proceeds of the public offering to initiate development of the "CHUCK CONNORS WONDERFUL WEST" entertainment complex on the company's WESTFIELD property because in truth and fact the Defendant LAND & LEISURE through its then officers and directors, had already determined that it would not follow through with its contractual commitment to build and develop the CHUCK CONNORS

WONDERFUL WEST complex, nor honor its contract with CHUCK CONNORS. Thus the Prospectus failed to disclose that the company was faced with a substantial likelihood of expensive and time-consuming litigation and, that the proceeds of the public offering to be allocated to the development of this entertainment complex as set forth in the "Use of Proceeds" section of the Prospectus, would be used in other ways.

(i) The Prospectus further failed to disclose the material fact that as of the effective date of the Prospectus, to wit, June 17, 1971, Defendant LAND & LEISURE was in default under the terms of its mortgages encumbering its WESTFIELD, WESTVIEW and WESTMONT properties, and further it entered into an agreement with the mortgagee, WILLIAM MOSER and/or NATIONAL OIL & GAS, INC. (a corporation wholly owned by WILLIAM MOSER), whereby said defaults were to be cured by using the $350,000 which had been stated in the Prospectus as being allocated to the development of the CHUCK CONNORS WONDERFUL WEST complex.

26. On information and belief, at all times herein mentioned and at the time the Prospectus was prepared, its effective date, and date of circulation, the aforementioned Defendants LAND & LEISURE, ROBERT LITTLE, JEROME GROSSMAN, ARTHUR

YOUNG and RAYMOND, JAMES, well knew that said Prospectus contained false statements and omissions of material fact necessary in order to make the statements made therein not misleading as to the condition of Defendant LAND & LEISURE, but they nevertheless consented, aided and abetted, or acquiesced in, a submission of the Prospectus to prospective purchasers of the stock of Defendant LAND & LEISURE, and accepted purchasers of the stock of Defendant LAND & LEISURE, and accepted the benefits resulting from the sale of the stock and retained and still retain the benefits.

27. At the time of the effective date (June 17, 1971), and circulation of the Prospectus to the public at large and the Plaintiff, the representations contained in the Prospectus as set forth above were false and misleading and contained omissions of material fact necessary in order to make the statements made therein not misleading, and in truth, the condition of Defendant LAND & LEISURE was not as represented in the Prospectus.

28. At the time the false and misleading representations and omissions of material fact necessary in order to make the facts stated therein not misleading, were made, they were known to the Defendants and each of them, to be false and misleading, and were made by the Defendants, and each of them, with the intent to deceive and defraud the general public, purchasers of stock and debentures of Defendant LAND & LEISURE, and in particular, your Plaintiff.

29. On or about June 24, 1971, a copy of the Prospectus was received by the Plaintiff through the United States Mails from the Defendant RAYMOND, JAMES, acting in its capacity as underwriter of the public offering of the Defendant LAND & LEISURE.

30. At the time the Prospectus was received and at the time of the purchase by the Plaintiff of the stock of Defendant LAND & LEISURE, on the dates and in the amounts as aforesaid, at Paragraph 29 above, the Plaintiff was unaware of the falsity of the representations contained therein, was unaware of the omissions of material fact, but he believed the Prospectus to be true and relied upon it in his purchases of the common stock of the Defendant LAND & LEISURE. As a result of the Prospectus, Plaintiff was induced to and did, on or about those dates set forth above at Paragraph 29 purchase some 9,500 shares of common stock of Defendant LAND & LEISURE, for which he paid the aggregate sum of $54,000. From the time the misrepresentations were made in the Prospectus until in or about October 1977, the Defendants LITTLE, ARTHUR YOUNG and RAYMOND, JAMES and each of them, aided and abetted by the others, engaged in a continuing course of conduct to graudulently conceal the true financial condition of Defendant LAND & LEISURE from Plaintiff, and to prevent the Plaintiff from discovering any information regarding the affairs and status of Defendant LAND & LEISURE. Defendants, and each of them accomplished this concealment by causing the Defendant LAND & LEISURE to fail to file Annual Reports on Form 10-K, quarterly reports on Form 10-Q, current reports on Form 8-K, annual reports to shareholders, proxy statements to shareholders, all as required under the Rules and Regulations of the SEC pursuant to the

authority of the Securities Act of 1933 and the Securities Exchange Act of 1934, and further, in clear violation of the laws of the State of Florida as well as the aforementioned Federal Securities laws, failed to call or and hold a shareholders' meeting at any time from 1971 to and including the date of this pleading.

31. In addition these Defendants were aided and abetted in their continuing course of conduct to fraudlently conceal the true financial condition of the Defendant LAND & LEISURE by the present Board of Directors of Defendant LAND & LEISURE, to wit, GUY BAILEY, SR., GUY BAILEY, JR., ARECA STONE BAILEY, and CHARLOTTE BABCOCK, each of whom has served as a director and officer of the Defendant LAND & LEISURE from on or about February 16, 1971 to present.

32. In or about May of 1977 under the Florida Statute §607.01 et seq., to enforce his right to review the books and records of the Defendant LAND & LEISURE, and it was not until October, 1977, after having enforced his right to such information, that Plaintiff was given access to any books and records concerning the affairs of Defendant LAND & LEISURE, and even after having been given access to the books and records of Defendant LAND & LEISURE, agents of this Defendant, acting in the course and scope of their agency relationship continued this course of conduct as hereinabove referred by hiding records from the Plaintiff, including books of account, Minutes and ledger sheets, removed records and hid same, deliberately and/or negligently caused false entries to be made in those books and records of Defendant LAND & LEISURE, to which the Plaintiff was given access, and by deliberately advising Plaintiff that certain books and records were

lots or destroyed, when in truth and fact the same were in the possession, custody and control of either counsel for Defendant LAND & LEISURE or its officers, employees, or agents.

33. Plaintiff hereby tenders the subject shares of stock to the Defendants, and each of them, and demands payment by Defendants to him of the amount paid for the stock, a total of $54,000.

WHEREFORE, Plaintiff demands judgment against Defendants LAND & LEISURE, ROBERT LITTLE, JEROME GROSSMAN, ARTHUR YOUNG & COMPANY, and RAYMOND, JAMES & ASSOCIATES, INC., jointly and severally, in the amount of $54,000, which is the difference between the actual value of the securities of the Defendant LAND & LEISURE owned by Plaintiff, and the amount paid therefor by Plaintiff, plus attorney's fees, interest and the costs of this action.

COUNT IV

Based Upon Section 11 of the Securities Act

34. Plaintiff restates and realleges Paragraphs 1 through 14.

35. For the purpose of bringing about a sale of the stock of the Defendant LAND & LEISURE of the value of $1,600,000, the sale of collateralized subordinated sinking fund debentures of the value of $2 million dollars, the Defendants LAND & LEISURE, ROBERT LITTLE, JEROME GROSSMAN, ARTHUR YOUNG & COMPANY and RAYMOND, JAMES & ASSOCIATES,

INC., negligently prepared, or negligently caused to be prepared, or negligently assisted in the preparation of, a Prospectus for general distribution among the public and to the Plaintiff who might thereby be induced to purchase said stock and/or debentures of the Defendant LAND & LEISURE (see Exhibit A).

36. The Defendants, and each of them, were under a duty to Plaintiff to file a true and correct Prospectus containing true statements of material fact, as well as complete statements of all material facts necessary in order to make the statements not misleading, pursuant to the provisions of §5(b) of the Securities Act and the Rules and Regulations of the SEC promulgated thereunder.

37. The Defendants, and each of them, breached said suty to Plaintiff by negligently filing, or negligently causing to be filed, or negligently assisting in the preparation of a Prospectus which at the time of its circulation to the public and Plaintiff, as well as at the time of its effective date, to wit, June 17, 1971, contained therein representations as to the condition of Defendant LAND & LEISURE which were false and misleading, and in addition thereto contained omissions of material fact necessary in order to make the statements made therein not misleading, as these Defendants knew or should have known, in the exercise of ordinary care.

38. On or about June 24, 1971, a copy of the Prospectus was received by the Plaintiff through the United States Mails from Defendant RAYMOND, JAMES.

39. At the time the Prospectus was received by the Plaintiff he was ignorant of the falsity of its

representations, but believed them to be true and relied upon them. As a result the Plaintiff was induced to purchase and did in fact purchase on or about those dates set forth at Paragraph 15 above, from Defendant RAYMOND, JAMES, in its capacity as underwriter of the Defendant LAND & LEISURE's public offering, some 9,500 shares of common stock of the Defendant LAND & LEISURE, for which he paid the total aggregate sum of $54,000.

40. The Prospectus contained the following misstatements of material fact and omitted to state material facts necessary in order to make the statements made therein not misleading in the following manner:

(a) The Prospectus failed to disclose that one L. R. BROOKS was a controlling shareholder of Defendant LAND & LEISURE by virtue of his beneficial ownership of 113,000 shares of the common stock of Defendant LAND & LEISURE, or 39.4% held in the names of JEROME GROSSMAN, MURRAY SCHWARTZ, and/or ROBERT LITTLE.

(b) The Prospectus failed to disclose that one L. R. BROOKS had an indirect controlling interest in the Defendant LAND & LEISURE by virtue of his ownership of a controlling interest in CORDWELL INTERNATIONAL DEVELOPMENTS, LTD., which company owned beneficially 35.6% of the shares of common stock of Defendant LAND & LEISURE as of the date of the Prospectus.

(c) The Prospectus failed to disclose that L. R. BROOKS maintained an office on the premises of Defendant LAND & LEISURE, exercised a controlling influence over the other officers and directors of the Defendant LAND & LEISURE, and in truth and fact was responsible for the day to day operations and management of the company.

(d) The Prospectus contained affirmative misstatements of fact wherein it stated that the company's "WESTVIEW" property had substantially similar characteristics to the company's "WESTFIELD" property, when same was in fact not the truth. The Prospectus further omitted to state material facts regarding the Defendant LAND & LEISURE's "WESTVIEW" property necessary in order to make the statements made not misleading by failing to disclose that "WESTVIEW" property was under water all year ranging from 2 feet to over 16 feet; that it lacked access from any public road or highway; and that it would cost Defendant LAND & LEISURE approximately $40,000,000 to drain said property in order to develop same for resale to third party members of the public, said sum being far in excess of the maximum amount for which the Defendant LAND & LEISURE could hope to sell said property, and that in truth and fact

such property which had been purchased for $1,200,000 was worthless.

(e) The Prospectus omitted to state material facts regarding its land sales registration by the Florida Land Sales Board, necessary in order to make the statements not misleading, by failing to disclose that 112 of the 656 units of land (17%) alleged registeredd by the Defendant LAND & LEISURE for sale with the Florida Land Sales Board, were in truth and fact unregistered, could not and should not have been sold to third parties, and subjected the Defendant LAND & LEISURE to such sanctions (by way of example) as a recision of all sales to third parties, which sanction would have the practical effect causing the company to have to cease all operations.

(f) The Prospectus failed to disclose that LAND & LEISURE's accounting firm, Defendant ARTHUR YOUNG, was owed the sum of $85,000 for past due accounting and auditing fees, as of the effective date of the Prospectus, and that as a result Defendant LAND & LEISURE had pledged Accounts Receivable to ARTHUR YOUNG in the amount of $127,500. The Prospectus further failed to state under the Section titled "Use of Proceeds" that on or about the effective date of the Prospectus, Defendant LAND & LEISURE

and Defendant ARTHUR YOUNG had agreed that ARTHUR YOUNG would be paid the sum of $50,000 on its past due accounting auditing fees from the proceeds of the public offering.

(g) The Prospectus failed to disclose that at the time of the public offering, the Defendant LAND & LEISURE by and through its officers and directors, had already determined that it would not follow through with its commitment to build and develop the "CHUCK CONNORS WONDERFUL WEST" complex nor honor its contract with CHUCK CONNORS for same, and that as a result it was faced with the substantial likelihood of expensive and time-consuming litigation.

(h) On or about the effective date of the Prospectus, to wit, June 17, 1971, Defendant LAND & LEISURE was in default under the terms of its mortgages encumbering its WESTFIELD, WESTVIEW, and WESTMONT properties, and had already entered into an agreement with the mortgagees, WILLIAM MOSER and/or NATIONAL OIL & GAS, INC. (a wholly owned corporation of Mr. MOSER), whereby said defaults were to be cured by Defendant LAND & LEISURE's diverting $350,000 from the CHUCK CONNORS WONDERFUL WEST complex to "pay off" WILLIAM MOSER and/or NATIONAL OIL & GAS, INC.

41. Plaintiff did not discover the falsity of the representations contained in the Prospectus until in or about October, 1977. Plaintiff could not reasonably have discovered the falsity of such representations contained in the Prospectus since the Defendants ROBERT LITTLE, JEROME GROSSMAN, ARTHUR YOUNG, RAYMOND, JAMES, and LAND & LEISURE, and each of them, at all times material herein had engaged in continuing course of conduct and conspiracy to fraudulently conceal from the Plaintiff those misstatements of material fact and omissions of material fact necessary in order to make the statements made therein not misleading in substantially the following manner.

(a) At a meeting of the Board of Directors of Defendant LAND & LEISURE held on or about October 12, 1971, a discussion was held by the then present Directors concerning the sale by Defendant LAND & LEISURE of 112 unregistered units of land in volation of the laws of the State of Florida. Further, the Directors discussed at said meeting a disclosure of such information could require LAND & LEISURE to make offers of recision to all who purchased such units of land and thereby effectively close Defendant LAND & LEISURE and abort the public offering then proceeding.

(b) Further, at the meeting of October 12, 1971, as aforesaid, it was disclosed that as a result of such sales of unregistered land, the sale of the collateralized

subordinated sinking fund debentures had been suspended in August, 1971 by the unilateral act of the Defendant RAYMOND, JAMES.

(c) Notwithstanding the materiality of the foregoing events, no posteffective amendment of the Registration Statement and Prospectus then in effect was filed, nor was any current report on Form 8-K filed with the SEC, nor was any public disclosure of same made by the Defendants to Plaintiff, and the Plaintiff continued to make purchases of stock of Defendant LAND & LEISURE on or after said date, relying upon the Prospectus.

(d) On December 22, 1971, a meeting of the Board of Directors of Defendant LAND & LEISURE was held. At such meeting it was disclosed that Defendant LAND & LEISURE used for its general operating purposes, $220,000 of funds received from third party purchasers of its land, which funds should have been placed in a special escrow account to conform to Florida Land Sales Board requirements.

(e) It was further disclosed at the said meeting of December 22, 1971, that property represented to third party purchasers of tracts of land in WESTFIELD III as free and clear, was in fact encumbered by two mortgages and as a result thereof, the Defendant LAND & LEISURE was faced

with having to rescind all WESTFIELD III sales and refund the purchase monies therefor to third party purchasers, which money Defendant LAND & LEISURE did not have.

(f) It was further disclosed at the said Board of Directors meeting of December 22, 1971, that the Defendant ROBERT LITTLE was on information and belief, using Defendant LAND & LEISURE as a vehicle for moving money into the United States from a Jamaican or Bahamian corporation, or both, ("laundering") for his own benefit, which money should have been taxed, but was not, and as a result, the Defendant LAND & LEISURE faced potential serious tax consequences with the United States Internal Revenue Service. At said meeting the hiring of special tax counsel to determine what liability, if any, was faced by the Defendant LAND & LEISURE as a result of these actions of the Defendant ROBERT LITTLE was discussed, however, no affirmative action was taken by the Board of Directors.

(g) As a result of the foregoing matters, the Board of Directors of the Defendant LAND & LEISURE should properly have publicly disclosed the aforementioned information through the filing of appropriate reports with the SEC on Form 8-K, and making a public announcement. Notwithstanding the said obligation, no matter was ever filed

or disclosed to the public and the Plaintiff continued to make purchases of the stock of the Defendant LAND & LEISURE after the date of said meetings.

(h) On or about February 15, 1972, a meeting of the Board of Directors of Defendant LAND & LEISURE was held. At this meeting the question of public disclosure of the financial difficulties, as well as the other difficulties of Defendant LAND & LEISURE, as set forth hereinabove, were discussed and the aforesaid Defendants failed and refused to take the steps necessary to make public disclosure of the financial and other difficulties of the Defendant LAND & LEISURE, and in truth and fact, took affirmative action to keep such information from becoming public.

(i) On or about February 16, 1972, control of the Defendant LAND & LEISURE was sold to UNITED RESOURCES, INC., a Florida corporation. Control was acquired by the sale of the stock of certain insiders, to wit, Defendant ROBERT LITTLE, one L. R. BROOKS, Defendant JEROME GROSSMAN, and CORDWELL INTERNATIONAL DEVELOPMENTS, LTD. At said meeting UNITED RESOURCES, INC. caused the resignation of Defendant ROBERT LITTLE, and one THOMAS HAMILTON, OSCAR CORDERA, ARTHUR PAPAZIAN, and

JACK LASONDER. In the places of the aforementioned Directors of the Defendant LAND & LEISURE, UNITED RESOURCES, INC. caused the election of the following individuals to the Board of Directors of the Defendant LAND & LEISURE, all of whom accepted their office, and served as Directors of the Defendant LAND & LEISURE at all times material herein, to wit, the Defendants GUY BAILEY, SR., GUY BAILEY, JR., ARECA STONE BAILEY, and CHARLOTTE BABCOCK, as well as one STEVEN W. ARKEY. Upon information and belief Mr. ARKEY subsequently resigned his position as a Director of the Defendant LAND & LEISURE on or about February 17, 1972.

(j) Upon information and belief, the new Board of Directors, GUY BAILEY, SR., GUY BAILEY, JR., ARECA STONE BAILEY and CHARLOTTE BABCOCK, new or should have known, by the exercise of ordinary care, of the misstatements of material fact and of the omissions of material facts necessary in order to make the statements made not misleading as contained in the Prospectus. That these Defendants knew or should have known of said misstatements and omissions is established by their admission at the Board of Directors' meeting of February 16, 1972, that they at all times were aware of the true condition of the Defendant LAND &

LEISURE. Further, these Defendants, BAILEY, SR., BAILEY, JR., ARECA STONE BAILEY and CHARLOTTE BABCOCK, knew or should have known that those items as set forth hereinabove should have been disclosed by the filing of a post-effective amendment to the Registration Statement, or the filing of a current report on Form 8-K of through other public announcement. Notwithstanding the foregoing, the Defendants GUY BAILEY, SR., GUY BAILEY, JR., ARECA STONE BAILEY, and CHARLOTTE BABCOCK, joined in and continued the scheme and conspiracy to prevent disclosure of the true conditon of the Defendant LAND & LEISURE to the investing public as well as this Plaintiff, and were aided and abetted in this regard by the Defendants ROBERT LITTLE, JEROME GROSSMAN, ARTHUR YOUNG, and RAYMOND, JAMES, in order to protect the investment of UNITED RESOURCES, INC. (of which the Defendants BAILEY, SR., BAILEY, JR., ARECA STONE BAILEY, and CHARLOTTE BABCOCK owned approximately 90% of the issued and outstanding stock) in the Defendant LAND & LEISURE.

(k) In order to accomplish the foregoing, the Defendants GUY BAILEY, SR., GUY BAILEY, JR., ARECA STONE BAILEY, and CHARLOTTE BABCOCK, from on

or about February 16, 1972 to date, conspired with the former officers and directors of the Defendant LAND & LEISURE, to wit, ROBERT FISCHER, ROBERT LITTLE, and JEROME GROSSMAN, as well as with the lead underwriter of the Defendant LAND & LEISURE's public offering, to wit, RAYMOND, JAMES, as well as with a new employee of the Defendant LAND & LEISURE, to wit, ROBERT FISCHER, and the accounting auditing firm of the Defendant LAND & LEISURE, ARTHUR YOUNG, whereby LAND & LEISURE would not prepare nor file documents with the SEC notwithstanding the clear requirements of the Securities Act and the Exchange Act and the rules and regulations promulgated thereunder. In addition the Defendants further caused the Defendant LAND & LEISURE to fail to file and mail to shareholders annual reports detailing its financial condition as of a date certain, caused the Defendant LAND & LEISURE to fail to file and mail to shareholders proxy statements as required under Section 14 of the Exchange Act, and further, the Defendants BAILEY, SR., BAILEY, JR., ARECA STONE BAILEY, CHARLOTTE BABCOCK and ROBERT FISCHER, by virtue of their control of the Defendant LAND & LEISURE, caused LAND & LEISURE to fail to call a single annual meeting of shareholders during the period

Febreuary 16, 1972 to date, notwithstanding the clear requirements for an annual meeting of shareholders under applicable Federal and State law as well as under the By-Laws of the Defendant LAND & LEISURE.

(l) In addition, the Defendant GUY BAILEY, SR., GUY BAILEY, JR., ARECA STONE BAILEY, CHARLOTTE BABCOCK, and ROBERT FISCHER, in their capacities as directors and/or officers of the Defendant LAND & LEISURE, took affirmative action to prevent your Plaintiff from learning anything at all about the true condition of the Defendant LAND & LEISURE through the means and instrumentalities of interstate commerce, including the mails and telephonic communication, whereby they represented to your Plaintiff on numerous occasions that reports on the financial condition would be forthcoming, that all was well with the Defendant LAND & LEISURE, and that annual meetings of shareholders as well as SEC reports would be forthcoming, when in truth and fact, they, and each of them, knew or should have known in the exercise of ordinary care that such was not the case.

(m) Plaintiff was denied access to the books and records of the Defendant LAND & LEISURE, until suit was instituted in the Circuit Court of the Eleventh Judicial

Circuit in and for Dade County, Florida, in a case styled "Roger L. Summer vs. Land & Leisure, Inc. and Robert R. Fischer", Case No. 77-14177. Even after your Plaintiff was allowed access to the books and records, the Defendant ROBERT FISCHER, aided and abetted by others whose names are presently unknown to your Plaintiff, attempted to prevent your Plaintiff from learning the true condition of the Defendant LAND & LEISURE by hiding records from your Plaintiff, by removing records supplied to the Plaintiff and hiding same, by deliberately and/or negligently causing false entries to be made in the books and records of the Defendant LAND & LEISURE, and by deliberately advising your Plaintiff that certain books and records were lost or destroyed when in truth and fact the same were in the possession, custody and control of the Defendant LAND & LEISURE, or its officers, employees or agents. At the time the false and misleading misrepresentations and omissions of material fact necessary in order to make the facts contained therein not misleading were made, they were known to the Defendants to be false and misleading, and were made by the Defendants with the intent to deceive and defraud the general public, purchasers of stock and debentures of the Defendant LAND & LEISURE in connection with the public

offering then proceeding, and in particular, this Plaintiff.

42. On or about June 24, 1971, a copy of the Prospectus was received by the Plaintiff through the United States Mails from the Defendant RAYMOND, JAMES.

43. At the time the Prospectus was received by the Plaintiff and at the time of the purchase by the Plaintiff of the common stock of the Defendant LAND & LEISURE he was unaware of the falsity of the representations contained therein, and he was unaware of the omissions of material fact necessary in order to make the statements made therein not misleading, but he believed the Prospectus to be true and relied upon it in his purchase of the stock of the Defendant LAND & LEISURE. As a result, Plaintiff was induced to, and did on or about those dates set forth above at Paragraph 29, purchase 9,500 shares of the common stock of Defendant LAND & LEISURE for which he paid the aggregate sum of $54,000.

44. Plaintiff hereby tenders the subject shares of stock to the Defendants and demands payment by the Defendants jointly and severally to him of the amount paid for the stock, a total of $54,000.

WHEREFORE, Plaintiff demands judgment against Defendants LAND & LEISURE, ROBERT LITTLE, ROBERT FISCHER, JEROME GROSSMAN, ARTHUR YOUNG & COMPANY, and RAYMOND, JAMES & ASSOCIATES, INC., in the amount of $54,000, which is the difference between the actual value of the securities

of the Defendant LAND & LEISURE and the amount paid therefor by the Plaintiff, plus attorney's fees, interest, and the csts of this action.

COUNT V

Based Upon Section 12(2) of the Securities Act

45. Plaintiff restates and realleges Paragraphs 23 through 33 inclusive, as if more fully set forth herein.

46. By virtue of the happening of the foregoing events, the Registration Statement and Prospectus filed with the SEC contained false and misleading statements of material fact, and failed to state other material facts necessary in order to make the statements contained therein not misleading, all in violation of Section 12(2) of the Securities Act, (15 U.S.C. §771(2)).

WHEREFORE, Plaintiff demands judgment against Defendants LAND & LEISURE, ROBERT LITTLE, JEROME GROSSMAN, GUY BAILEY, SR., GUY BAILEY, JR., ARECA STONE BAILEY, CHARLOTTE BABCOCK, ARTHUR YOUNG & COMPANY and RAYMOND, JAMES & ASSOCIATES, INC., jointly and severally, in the amount of $54,000, which is the difference between the actual value of said securities and the amount paid therefor by Plaintiff, plus attorney's fees, interest, and the costs of this action.

COUNT VI

Based on Common Law Fraud

47. Plaintiff restates and realleges Paragraphs 23 through 33, inclusive, as if more fully set forth herein.

48. By reason of the foregoing wrongful conduct, the Defendants LAND & LEISURE, ROBERT LITTLE, JEROME GROSSMAN, GUY BAILEY, SR., GUY BAILEY, JR., ARECA STONE BAILEY, CHARLOTTE BABCOCK, ARTHUR YOUNG & COMPANY, and RAYMOND, JAMES & ASSOCIATES, INC., ane each of them, engaged in a course of conduct designed to fraudulently conceal the true financial condition of the Defendant LAND & LEISURE from Plaintiff as well as other shareholders, whereby Plaintiff has been damaged in an amount to be determined at trial but not less than $54,000.

WHEREFORE, Plaintiff demands judgments against Defendants LAND & LEISURE, ROBERT LITTLE, JEROME GROSSMAN, GUY BAILEY, SR., GUY BAILEY, JR., ARECA STONE BAILEY, CHARLOTTE BABCOCK, ARTHUR YOUNG & COMPANY, and RAYMOND, JAMES & ASSOCIATES, INC., jointly and severally, for an amount in excess of $54,000, plus punitive damages in the amount of $540,000, plus interests and the costs of this action.

COUNT VII

Based Upon Sections 517.21 and 517.301
of the Florida Statutes

49. Plaintiff restates and realleges Paragraphs 1 through 20 inclusive, as if more fully set forth herein.

50. The foregoing wrongful conduct of the Defendants constitutes a violation of Florida Statutes, Section 517.301(1)(b) and Plaintiff has elected to rescind said sales to him under the provisions of Section 517.21, Florida Statutes, and herewith tenders to the Defendants the stock of the Defendant LAND & LEISURE heretofore delivered to him, and demands the return of the monies due to him in accordance with said Section 517.21.

51. Plaintiff has been required to retain the services of the undersigned attorneys and to pay them a reasonable attorney's fee.

WHEREFORE, Plaintiff demands judgment against the Defendants LAND & LEISURE, ROBERT LITTLE, JEROME GROSSMAN, ARTHUR YOUNG & COMPANY, and RAYMOND, JAMES & ASSOCIATES, INC., jointly and severally, in the amount of $54,000, the amount paid for the said securities, together with interest, costs, and a reasonable attorney's fee.

COUNT VIII

Based Upon the Common Law of the State of Florida

52. Plaintiff sues Defendants, and as grounds therefor alleges:

53. Plaintiff is a citizen and resident of the State of Florida, and sui juris.

54. Defendants ROBERT LITTLE, and JEROME GROSSMAN are citizens of the State of Florida, and sui juris.

55. At all times material herein, beginning on or about June 24, 1971, Plaintiff was and continues to be the owner and holder of 9,500 shares of the common stock of the Defendant LAND & LEISURE, INC., a Florida corporation.

56. At all times material herein, the Defendants were members of the Board of Directors of LAND & LEISURE, INC., and/or its officers and functioned in such capacity.

57. The acts of omission and commission hereinbelow complained of occurred in this judicial district. As Directors of LAND & LEISURE, INC., the aforesaid Defendants were under a continuing duty of loyalty and a continuing duty of care, including a duty to be attentive to the corporation's business, and further they owed a duty of loyalty to LAND & LEISURE, INC. In addition, these Directors in their capacity as

Directors of LAND & LEISURE, INC., had the fundamental responsibility of representing the interests of the shareholders and in particular, your Plaintiff as one of such shareholders.

58. The Defendants and each of them breached said duties to the Plaintiff in the following fashion.

(a) The Defendants ROBERT LITTLE and JEROME GROSSMAN in or about January, 1970, a more definite time being unknown to Plaintiff, approved the purchase of a tract of land by LAND & LEISURE, INC., located in Osceola County, Florida (hereinafter referred to as "WESTVIEW") for the sum of $1,200,000 from one WILLIAM MOSER and NATIONAL OIL & GAS, INC., an affiliate of MOSER.

(b) The aforementioned Directors approved said purchase of the land without physically viewing the land, without obtaining a survey of the land, without consulting with any land engineer or surveyor, notwiethstanding the fact that said property was being purchased by LAND & LEISURE, INC., for resale to third parties, in the ordinary course of business of LANE & LEISURE, INC.

(c) On or about June 2, 1971, a date more definite presently unknown to Plaintiff, and some 15 days before the effective date of LAND & LEISURE. INC.'s

Registration Statement for its public offering of its common stock, said Directors knew or in the exercise of due care should have known, that LAND & LEISURE, INC. had been defrauded by WILLIAM MOSER and NATIONAL OIL & GAS, INC. in the purchase of the WESTVIEW land in that said land was not suitable for resale to third parties because of the following facts:

(1) The only possible method of drainage would necessitate spending $30,000 to $40,000 per acre for same, or a sum approximately five times the retail value of such acreage sold to third parties;

(2) There was no access road to said land;

(3) Said land was covered with water twelve months a year ranging in depth from 2 feet to 16 feet; and

(4) Said land could not be resold under the zoning requirements of Osceola County, Florida, until such time as paved roads, underground utilities, sidewalks and sewage treatment plants were installed by LAND & LEISURE, INC.

(d) That the aforesaid Directors knew or should have known of such fraud is apparent by virtue of correspondence dated

June 2, 1971 between L. R. BROOKS and Defendant JEROME GROSSMAN, who was a Director and Executive Vice President of LAND & LEISURE on said date; by correspondence dated June 14, 1971 between L. R. BROOKS and Defendant ROBERT LITTLE, who was a Director and President of LAND & LEISURE, INC. on said date; and by virtue of a Memorandum dated June 23, 1971 between L. R. BROOKS and Defendant ROBERT LITTLE.

(e) Notwithstanding the foregoing, these Defendants negligently allowed false and misleading information concerning the said WESTVIEW property to be printed in the Prospectus issued in connection with LAND & LEISURE, INC.'s public offering of June 17, 1971.

(f) The aforementioned Directors further breached their duty of care and their duty of loyalty to Plaintiff by causing LAND & LEISURE, INC. to enter into a recision of the purchase of the WESTVIEW property with WILLIAM MOSER and/or NATIONAL OIL & GAS, INC., an affiliate of MOSER's, wherein LAND & LEISURE, INC. on or about July 7, 1971, bought back from NATIONAL OIL & GAS, INC., 150,000 shares of the stock of CORDWELL INTERNATIONAL DEVELOPMENTS, LTD. for the sum of $120,000, which stock

had been transferred to NATIONAL OIL & GAS, INC. in connection with the purchase of the WESTVIEW property: in addition LAND & LEISURE, INC. paid additional consideration of $330,000 in cash to MOSER and further released MOSER and NATIONAL OIL & GAS, INC. from any and all liability for the fraud. As a result of the foregoing, LAND & LEISURE, INC. was constrained to abandon its plans to develop the CHUCK CONNORS WONDERFUL WEST complex, and thus subject the company to expensive and time-consuming litigation with CHUCK CONNORS, and further, while the aforementioned rescision was consummated on or about July 7, 1971, and was paid with funds from the public offering then ensuing, of LAND & LEISURE, INC., said agreement had been reached with MOSER and/or NATIONAL OIL & GAS prior to the effective date of the Prospectus, to wit, on or about June 17, 1971, and as a result these Directors allowed a false and fraudulent statement under the "Use of Proceeds" section of the Prospectus to be filed with the Commission and to be distributed to the public. Further, these Directors allowed the defrauding parties, to wit, WILLIAM MOSER and/or NATIONAL OIL & GAS, INC., to be released from any liability to LAND & LEISURE, INC., for the fraud, and thus gave away a potentially valuable right of the company.

(g) These Directors also, during the period June 17, 1971, to and including February 15, 1971, failed to take any action or file any reports on Form 8-K or Form 10-Q as required by the rules and regulations of the SEC pursuant to the Securities Act and the Exchange Act, and thus subjected LAND & LEISURE to the appropriate remedial sanctions by the SEC, including the suspension of trading of its stock.

(h) At or about October 1971 to and including February 16, 1972, THOMAS HAMILTON, EDWARD KOBE, OZZIE MANN, ARTHUR PAPAZIAN, and JACK LASONDER, were appointed to the Board of Directors of LAND & LEISURE, INC., and accepted such appointments and at all times material herein acted in the course and scope of their relationship as a Director of LAND & LEISURE, INC. During approximately February of 1972 the Defendants ROBERT LITTLE, JEROME GROSSMAN, and one OSCAR CODERO, THOMAS HAMILTON, EDWARD KOBE, OZZIE MANN, ARTHUR PAPAZIAN and JACK LASONDER were either grossly negligent or engaged in a course of fraudulent mismanagement whereby these Defendants in their capacity as Directors of LAND & LEISURE, INC. failed to take advantage of corporate opportunity wherein LAND & LEISURE, INC. would obtain necessary long-term financing when, at a Board of Directors' meeting on or

about February 15, 1972, said Directors turned down a proposal for a line of credit to LAND & LEISURE, INC. of $2.5 million dollars at reasonable terms, and an additional equity investment by the party providing the line of credit of $750,000. Instead, these Defendants through self-dealing and blatant disregard for Plaintiff's rights as a stockholder, allowed UNITED RESOURCES, INC. to acquire approximately 46%, or 245,125 shares of the issued and outstanding common stock of LAND & LEISURE, INC.

(i) The Defendants JEROME GROSSMAN and ROBERT LITTLE at some between October 1971 and February 15, 1972, a date more specific presently unknown to Plaintiff, entered into an agreement with UNITED RESOURCES, INC. along with one L. R. BROOKS and CORDWELL INTERNATIONAL DEVELOPMENT, LTD., whereby UNITED RESOURCES, INC. would buy, and LITTLE, GROSSMAN, BROOKS, and CORDWELL INTERNATIONAL DEVELOPMENT, INC., would sell, all of the common stock of LAND & LEISURE, INC. held by LITTLE, GROSSMAN, BROOKS and CORDWELL INTERNATIONAL DEVELOPMENT, LTD. The Defendants LITTLE and GROSSMAN were thus able to obtain as a part of the sale of their stock to UNITED RESOURCES, INC. a price in excess of the price at which the

shares of LAND & LEISURE, INC. were selling on the open market. Further, these Defendants with the acquiesence of the Board of Directors as aforesaid, in effect permitted a de facto "going private" disposal of LAND & LEISURE, INC. since by virtue of their ownership of 46% of the issued and outstanding stock of LAND & LEISURE, INC., UNITED RESOURCES, INC. could control and did in truth and fact control, all facets of the management and operations of LAND & LEISURE, INC. to the detriment of the other shareholders and your Plaintiff.

(j) The Defendants LITTLE and GROSSMAN as well as CORDERO, HAMILTON, KOBE, MANN, PAPAZIAN, FERRIER and LASONDER, failed to investigate or even inquire as to the intentions of UNITED RESOURCES, INC. in acquiring control of LAND & LEISURE, INC., since, upon information and belief, approximately thirty days prior to February 15, 1972, Defendants LITTLE and GROSSMAN, as well as BROOKS and CORDWELL INTERNATIONAL DEVELOPMENTS had already entered into a secret undisclosed agreement with UNITED RESOURCES, INC. wherein they would sell control of LAND & LEISURE, INC. to UNITED RESOURCES, INC.. In addition, upon information and belief, L. R. BROOKS, as well as Defendants JEROME GROSSMAN and ROBERT

LITTLE owned an undisclosed equity position in UNITED RESOURCES, INC., at or about the same time the foregoing events took place.

(k) On or about February 16, 1972, UNITED RESOURCES, INC. did acquire control of LAND & LEISURE, INC., although, upon information and belief, at said date UNITED RESOURCES, INC. did not own any common stock of LAND & LEISURE, INC., but had only an alleged oral agreement to purchase same from the aforementioned Defendants GROSSMAN and LITTLE, and BROOKS and CORDWELL INTERNATIONAL DEVELOPMENTS. Nothwithstanding the foregoing the Board of Directors of LAND & LEISURE, INC., to wit, HAMILTON, CORDERO, PAPAZIAN, LASONDER, and Defendant LITTLE resigned their position as Directors of LAND & LEISURE, INC., and UNITED RESOURCES, INC. did cause to be elected in their place, Defendants GUY BAILEY, SR., GUY BAILEY, JR., ARECA STONE BAILEY, CHARLOTTE BABCOCK, as well as one STEPHEN W. ARKEY.

59. As a direct and proximate result of the gross negligence and/or fraudulent mismanagement of the Defendants LITTLE and GROSSMAN, as well as CORDERO, HAMILTON, KOBE, MANN, PAPAZIAN, CORDERO, FERRIER and LASONDER, Plaintiff has sustained the loss of his investment in LAND & LEISURE, INC., to wit, the sum of $54,000.

WHEREFORE, Plaintiff demands judgment against Defendants ROBER LITTLE and JEROME GROSSMAN, jointly and severally, in the amount of $54,000, plus punitive damages in the amount of $540,000, plus interest, plus the costs of this action.

COUNT IX

Based Upon the Common Law of the State of Florida

Plaintiff sues Defendants and as grounds therefore, alleges:

60. Plaintiff is a resident of Dade County, Florida, over the age of 21 years, and sui juris.

61. Defendants GUY BAILEY, SR., GUY BAILEY, JR., ARECA STONE BAILEY, and CHARLOTTE BABCOCK are all residents of Dade County, Florida, over the age of 21 years, and sui juris.

62. Defendant ROBERT FISCHER is over the age of 21 years, a resident of Dade County, Florida, and sui juris.

63. This is an action for damages in excess of $10,000 exclusive of interest and costs.

64. The acts of omission and commission hereinbelow complained of, occurred within this judicial district.

65. On or about February 16, 1972, Defendants GUY BAILEY, SR., GUY BAILEY, JR., ARECA STONE BAILEY and CHARLOTTE BABCOCK, were elected to the Board of Directors of LAND & LEISURE, INC., and at all times material hereto, were acting in the course and scope of their position as Directors of LAND & LEISURE, INC.

66. At all times material herein Defendants GUY BAILEY, SR., GUY BAILEY, JR., ARECA STONE BAILEY and CHARLOTTE BABCOCK, by assuming their office committed their allegiance to LAND & LEISURE and acknowledged that the best interests of the corporation and its shareholders must prevail over any individual interest of their own. These Directors at all times as Directors had a duty of loyalty to the corporation and its shareholders and a duty of care, including a duty to be attentive to the corporation's business.

67. Beginning on or about June 21, 1971 to and including January 3, 1972, the Plaintiff purchased in the aggregate 9,500 shares of the common stock of LAND & LEISURE, INC. Plaintiff is still the owner and holder of said 9,500 shares of common stock of LAND & LEISURE, INC., and was a stockholder at all times material herein.

68. The Defendants GUY BAILEY, SR., GUY BAILEY, JR., ARECA STONE BAILEY and CHARLOTTE BABCOCK breached their duty of loyalty and their duty of care to the shareholders and to your Plaintiff in substantially the following manner:

(a) These Defendants by virtue of their being controlling shareholders of UNITED RESOURCES, INC., were at all times material herein, aware of the serious financial condition and problems of LAND & LEISURE, INC.. These Defendants were well aware at all time that as a result of the problems being faced by LAND & LEISURE, INC., its viability as an ongoing entity was seriously in question. Notwithstanding this knowledge, these Defendants took affirmative action to prevent any disclosure as to the problems of LAND & LEISURE, INC. by virtue of filing reports on SEC Forms 8-K, 10-Q or 10-K. These Defendants took such action for the reason that such disclosure as they well knew would cause a tremendous decrease in the trading value of the stock of LAND & LEISURE, INC. and thus a tremendous loss on its investment by UNITED RESOURCES, INC.

(b) These Defendants further failed to participate actively in the direction of LAND & LEISURE, INC.'s corporate activities by failing to attend meetings of the Board of Directors of the company and indeed to even call such meetings, by failing to review documentation and information as to the affairs of LAND & LEISURE, INC. These Defendants failed to supervise the hiring and firing of personnel, including executive management

personnel, but rather acquiesced in the execution of employment agreements getween LAND & LEISURE, INC. and JACK LASONDER and ARTHUR PAPAZIAN, which agreement provided for salaries and other compensation to be paid to these two individuals totally out of line with their management responsibility at a time when LAND & LEISURE, INC. was in an insolvent position, and was in truth and fact a payoff to LASONDER and PAPAZIAN for their assistance in effectuating transfer of control of LAND & LEISURE to UNITED RESOURCES, INC.[1]

(c) These Directors were negligent in the hiring and firing of the executive management of LAND & LEISURE, INC., when, in and about May, 1973, a more specific date being unknown, they hired Defendant ROBERT FISCHER, who had no prior experience of any worth to LAND & LEISURE, INC.. These Defendants further authorized the payment of unwarranted compensation to ROBERT FISCHER when in addition to a regular salary they allowed Defendant FISCHER to engage in outside consulting jobs, to take trips at company expense to Europr, Mexico, Puerto Rico, and Freeport, Bahamas, which trips did not have a true business purpose, and ultimately allowed Defendant FISCHER to completely ignore his responsibilities to LAND & LEISURE,

INC. to the extent that LAND & LEISURE, INC. failed to keep proper records, books of account, stockholders' lists, ledgers, etc..

(d) These Directors were further negligent in that Defendant FISCHER, on his being hired, and later being made chief operating officer of the company, failed to insure that LAND & LEISURE, INC.'s principal disclosure documents,, such as prospectuses, proxy statements, and annual reports to shareholders were complete and accurate, when in truth and fact, at all times material herein, to wit, February 16, 1972 to and including the date of this Complaint, only one Form 10-K was ever filed with the SEC, notwithstanding the fact that such form is required at least annually, and no quarterly reports on Form 10-Q were ever filed with the SEC, notwithstanding the clear requirements of the Exchange Act and the rules and regulations of the SEC promulgated thereunder.

(e) These Defendants were further negligent and/or engaged in fraudulent misconduct when they failed to call an annual meeting of shareholders at any time during the period February 16, 1972 to the date of this Complaint, notwithstanding the clear requirement of same under the By-Laws of LAND & LEISURE, INC., under the applicable Florida Statutes (F.S. §607.01

et seq.), and the requirements of the Federal Securities laws.

(f) These Directors were also guilty of gross negligence and/or fraudulent mismanagement when they failed to disclose to the shareholders of the company the fact that a large portion of Accounts Receivable was purchased by foreign nationals which contracts for sale, as executed by such foreign nationals, were in violation of the laws of those Nations, principally Norway, such that approximately $1 million dollars of the assets of LAND & LEISURE, INC., as represented by its Accounts Receivable, were potnetially uncollectible by virtue of such contracts between a Norwegian national and LAND & LEISURE, INC., being in violation of Norwegian law.

(g) These Defendants were negligent and/or guilty of gross mismanagement when on or about August 27, 1975, they caused to be filed with the Commission a Form 10-K for the fiscal year end June 30, 1974. The Managing Vice President, to wit, Defendant ROBERT FISCHER, executed such 10-K on behalf of the company, which 10-K contained therein at Item 15, a false statement to the effect that LAND & LEISURE, INC., owed to its general counsel the sum of $64,000 in legal fees, when in truth and fact as these Defendants well knew, at no time were any invoices ever submitted to LAND & LEISURE,

INC. by the company's general counsel, nor were there ever any services rendered to LAND & LEISURE, INC. such that a fee of such size would have been earned, and upon information and belief, said figure was arrived at solely by virtue of the position of Defendant GUY BAILEY, JR., as a Director of LAND & LEISURE, INC., while at the same time being general counsel for LAND & LEISURE, INC.

69. As a direct and proximate result of the foregoing acts of commission and omission, Plaintiff's investment in the stock of LAND & LEISURE, INC. has become worthless, and he has been damaged in the approximate amount of $54,000.

WHEREFORE, Plaintiff demands judgment against Defendants GUY BAILEY, SR., GUY BAILEY, JR., ARECA STONE BAILEY, CHARLOTTE BABCOCK, and ROBERT FISCHER, jointly and severally, in the amount of $54,000, plus punitive damages in the amount of $540,000, plus interest, and the costs of this action.

/s/ Roger Summer

Roger Summer

DIXON, DIXON, LANE, MITCHELL & HARRIS
Attorneys for Plaintiff
700 Brickell Avenue, Suite 900
Miami, Florida 33131
Telephone: 358-1405

By /s/ [illegible]

STATE OF FLORIDA)
ss
COUNTY OF DADE)

BEFORE ME, the undersigned authority, personally appeared ROGER SUMMER, to me known to be the person described in and who executed the foregoing Complaint, and he acknowledged before me that he executed the same.

WITNESS my hand and official seal at Miami, Dade County, Florida, this 14th day of February, 1978.

Notary Public, State of Florida,
at Large

My commission expires:
NOTARY PUBLIC STATE OF FLORIDA
at LARGE
MY COMMISSION EXPIRES JULY 29, 1978
BONDED THRU MAYNARD BONDING AGENCY

81-2060

Supreme Court, U.S.
FILED
JUN 3 1982
ALEXANDER L. STEVAS,
CLERK

NO:

in the

Supreme Court

of the

United States

OCTOBER TERM, 1981

LAND & LEISURE, INC., et al.,

Petitioners,

vs.

ROGER L. SUMMER,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

GEORGE O. MITCHELL
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Counsel for Respondent

QUESTIONS PRESENTED FOR REVIEW

I. WHETHER THE FORMER FIFTH CIRCUIT'S REVERSAL OF THE TRIAL COURT'S IN LIMINE DISPOSITION OF PLAINTIFF SUMMER'S CLAIMS BROUGHT PURSUANT TO § 17 OF THE 1933 SECURITIES EXCHANGE ACT AND § 10b OF THE 1934 SECURITIES ACT AND RULE 10b-5 PROMULGATED THEREUNDER, WAS UNJUSTIFIED, WHERE THE COMPLAINT ALLEGED FACTS SHOWING PLAINTIFF'S DUE DILIGENCE IN DISCOVERING THE DEFENDANT'S FRAUDULENT CONCEALMENT OF THEIR INJURIOUS ACTIVITIES AND WHERE THE COMPLAINT REQUESTED INVOCATION OF THE FEDERAL EQUITABLE TOLLING DOCTRINE.

II. WHETHER THE FORMER FIFTH CIRCUIT'S DECISION THAT THE TOTALITY OF CIRCUMSTANCES PRESENT IN THE INSTANT CASE DID NOT PERMIT DISMISSAL PURSUANT TO FRCP 12(b)(6), SO UNFAIRLY REQUIRES DEFENDANTS TO DEFEND AGAINST THE ALLEGATIONS COMPLAINED OF BY SUMMER, AS TO WARRANT REVIEW BY THIS COURT.

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iii
OPINIONS BELOW	1
JURISDICTION	1
STATEMENT OF THE CASE	2
STATEMENT OF THE FACTS	4
ARGUMENT	
POINT I	5
POINT II	13
CONCLUSION	19
CERTIFICATE OF SERVICE	20

TABLE OF AUTHORITIES

CASES	PAGE
Azalea Meats, Inc. v. Muscat, 386 F.2d 5 (5th Cir. 1967)	2,9
Bailey v. Glover, 21 Wall. (88 U.S.) 342 (1875)	6,9,17
Bethel v. Jendeco Const. Co., 570 F.2d 1168 (3d Cir. 1978)	14
Conley v. Gibson, 355 U.S. 41, 78 S.Ct. 99 (1957)	3,14
Dorado v. Kerr, 454 F.2d 892 (9th Cir. 1972)	17
Dzenits v. Merrill Lynch Pierce Fenner & Smith, Inc., 494 F.2d 168 (10th Cir. 1974)	15,18
Ernst & Ernst v. Hochfelder, 424 U.S. 185, 96 S.Ct. 1375 (1976)	2,9
Fox v. Kane-Miller Corp., 542 F.2d 915 (4th Cir. 1976)	16
Fuls v. Shastina Properties, Inc., 448 F.Supp. 983 (N.D. Cal. 1978)	14
GSEC v. Capital Gains Bureau, 375 U.S. 180, 86 S.Ct. 275 (1963)	9
Harvey v. Eimco Corp., 32 F.R.D. 598 (E.D. Pa. 1963)	17
Holmberg v. Armbrecht, 327 U.S. 392, 66 S.Ct. 582 (1946)	6,9

Hupp v. Gray,
500 F.2d 993 (7th Cir. 1974) 17,18

In re Alodex Corp. Securities Litigation,
533 F.2d 372 (8th Cir. 1976) 16

Jablon v. Dean Witter & Co.,
614 F.2d 677 (9th Cir. 1980) 13,14,15

Klein v. Bower,
421 F.2d 338 (2d Cir. 1970) 16,18

Leone v. Aetna Casualty & Surety Co.,
599 F.2d 566 (3d Cir. 1979) 14,15

Morgan v. Koch,
419 F.2d 993 (7th Cir. 1969) 18

Mutual Fund Investors v. Putnam
Management Co.,
553 F.2d 620 (9th Cir. 1977) 14

Norbeck v. Davenport Community School Dist.,
545 F.2d 63 (1976) 17

Parrent v. Midwest Rug Mills, Inc.,
455 F.2d 123 (7th Cir. 1972) 18

Poller v. Columbia Broadcasting System,
Inc., 386 U.S. 464, 82 S.Ct. 486 (1962) 14

Robertson v. Seidman & Seidman,
609 F.2d 583 (2d Cir. 1975) 8

Sperry v. Barggren,
523 F.2d 708 (7th Cir. 1975) 8

State of Ohio v. Peterson, Lowry, Rall,
Barber & Ross, 651 F.2d 687 (10th
Cir. 1981) cert. den. 102 S.Ct. 392 (1981) 5,6,7,
8,9

Summer v. Land & Leisure, et al.,
664 F.2d 965 (5th Cir. 1981) 1,2,6, 11,12

Tomera v. Galt,
511 F.2d 504 (7th Cir. 1975) 8

Townsend v. Columbia Operations,
667 F.2d 844 (9th Cir. 1982) 17

Turner v. Lundquist,
377 F.2d 44 (9th Cir. 1967) 16

U.S. v. Kubrick,
444 U.S. 111, 100 S.Ct. 352 (1979) 5,6,9, 11

Vanderbloom v. Sexton,
422 F.2d 1233 (8th Cir. 1970)
cert. den. 400 U.S. 852, 91
S.Ct. 47 (1970) 15

STATUTES

Securities Act of 1933
§ 17, 15 U.S.C. § 77q ii

Securities Exchange Act of 1934
§ 10(b), 15 U.S.C. § 78j(b) ii,2,7

Florida Statutes
§ 95.11(3) 2
§ 517.21 2

RULES AND REGULATIONS

Rule 10b-5, 17 C.F.R. § 240.10b-5 ii,2, 13,15

Rule 12(b)(6), Fed.R.Civ.P. ii,5, 13,14

Rule 56, Fed.R.Civ.P. 14

TREATISE

10 Wright & Miller, Fed. Practice
and Procedure, § 2734 15

OPINIONS BELOW

The Former Fifth Circuit's opinion is reported in Summer v. Land & Leisure, Inc., 664 F.2d 965 (5th Cir. 1981). The opinion of the United States District Court for the Southern District of Florida, is unreported. However, the trial court's opinion is included in the Appendix of Petitioner Land & Leisure's Brief, App. 14-73.

JURISDICTION

Petitioners seek review of the Former Fifth Circuit's opinion rendered on December 28, 1981, and the denial of rehearing rendered on January 29, 1982, pursuant to 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

Since there is no federal statute of limitations applicable to private actions brought pursuant to § 10b of the Securities Exchange Act of 1934 and under the Commission's Rule 10b-5, federal courts generally look to the most closely analogous state statute of limitations. Ernst & Ernst v. Hochfelder, 425 U.S. 185 at 210, n. 29, 96 S.Ct. 1375, at 1389 (1976). In the instant case, the district court held that F.S. 517.21, which provides for a two year limitation period, was most appropriate. See Brief for Petitioner Land & Leisure, App. 15.

However, since F.S. 517.21 was repealed, effective January 1, 1975, the district court applied the statute of limitations for fraud, F.S. 95.11(3). The latter provides for a limitation period of four years.

Since all but the last of Summer's purchases of Land & Leisure stock occurred before January 3, 1973, the trial court applied the shorter two year statute of limitations, F.S. 517.21, to all but Summer's last purchase. Id. Accordingly, the trial court held that F.S. 517.21 barred Summer's claims for purchases of Land & Leisure stock from June 24, 1971 through December 27, 1972. Id. The trial court then applied F.S. 95.11(3), the four year statute of limitations, to Summer's final purchase of Land & Leisure stock on January 3, 1973, and held this claim was likewise time barred.

The Former Fifth Circuit held that, although state law controls the limitation period within which 10b claims must be initiated, federal law controls the tolling of this limitation period, i.e., when the clock begins to run. Azalea Meats, Inc. v. Muscat, 386 F.2d 5 (5th Cir. 1975).

The Former 5th Circuit reviewed the three facts which th trial judge found dispositive, i.e., (1) Land & Leisure, Inc.'s failure to hold annual shareholder meetings; (2) Land & Leisure, Inc.'s failure to send annual shareholder reports; and (3) the decline in the price of Land & Leisure

stock during the period encompassed by the complaint. 664 F.2d at 969-970. Given the totality of the facts, the Former Fifth Circuit ruled that it was error for the trial judge to conclude that " 'it appears beyond doubt that plaintiff can prove no set of facts in support of his claim which would entitle him to relief.' " Id., at 670, citing Conley v. Gibson, 335 U.S. 41, at 45-46, 78 S.Ct. 99, 101-02 (1957).

STATEMENT OF THE FACTS

Roger L. Summer, Respondent in the instant case, purchased 3,000 shares of Land & Leisure stock through Raymond James, an underwriter, on June 24, 1971 (Brief for Respondent Land & Leisure, Inc., App. 23). Over the course of the next two years, Summer continued to invest in the corporation, and by January 3, 1973, had accumulated 9,500 shares and had invested a total of approximately $54,000 in Land & Leisure stock. Id. In securing these purchases, Summer relied on the Prospectus for Land & Leisure which was filed with the SEC and which was sent to the Plaintiff through the mails in connection with the public offering of Land & Leisure common stock. (See Respondent Land & Leisure's Brief, App. 24, citing Summer's complaint).

The Prospectus contained false and misleading statements of material facts as well as omissions necessary in order to make the representations not misleading. Id., App. 24-39. Plaintiff Summer, in May 1977, successfully sued Land & Leisure to enforce his right to review the books and records of the corporation. (Id., App. 38). However, Defendants dragged their feet in complying with the court-ordered disclosure and continued to injure Summer by concealing their fraudulent activities. Id. Summer sought redress of his injuries, totalling $54,000, in the United States District Court for the Southern District of Florida on February 23, 1978. Id., App. 1.

I

THE TRIAL COURT IN THE INSTANT CASE ABUSED ITS DISCRETION IN DETERMINING THAT, AS A MATTER OF LAW, THE STATUTE OF LIMITATIONS APPLICABLE TO PLAINTIFF'S FEDERAL SECURITIES FRAUD CLAIMS HAD TOLLED AND THUS, THE TRIAL COURT'S DECISION THAT PLAINTIFF'S FEDERAL SECURITIES CLAIMS WERE TIME BARRED WAS APPROPRIATELY REVERSED.

Defendant Land & Leisure contends that the Former Fifth Circuit has erroneously thwarted the policies underlying statutes of limitation by reversing Judge Gonzalez, Jr.'s 12(b)(6) dismissal of Plaintiff Summer's federal securities law violation claims, even where the complaint alleged facts of Defendant's fraudulent concealment and Plaintiff's due diligence sufficient to justify invocation of the federal equitable tolling doctrine. (Brief for Petitioner Land & Leisure, pp.10-17). For their proposition that the policies of repose and protection of Defendants from "the cost and vexation of protracted litigations," Petitioners curiously rely on the Supreme Court's decision in U.S. v. Kubrick, 444 U.S. 111, 100 S.Ct. 352 (1979) and on the Tenth Circuit's decision in State of Ohio v. Peterson, Lowry, Rall, Barber & Ross, 651 F.2d 687 (10th Cir. 1981), cert. den., 102 S.Ct. 392 (1981).

Kubrick involved a complicated malpractice suit brought by a veteran against the government pursuant to the Federal Tort Claims Act (FTCA) 28 U.S.C. § 2401(b), for neomycin treatment improperly received at a veteran's hospital in January 1969. Id., at 353, 354. The FTCA, which waives the government's sovereign immunity, contains a two-year limitation provision. Id., at 354-357. This two-year limitation provision, applicable to claims brought under FTCA, represents the balance Congress struck in the context of tort claims brought against the government. Id. With this unequivocable expression of Congressional intent to implement a policy of encouraging prompt presentations of tort claims brought against the government in hand, the Supreme Court ruled in Kubrick that courts are not free to circum-

vent such express legislative intent through either too restrictive or too liberal a construction of FTCA limitation provisions. Id., at 357. The court noted that in actions brought under FTCA a plea of limitation is a meritorious defense, in itself, serving public interest. Id.

While on first glance, the bare holding of Peterson appears to support Respondent's contention that summary disposition was warranted in the instant case, the principles laid down by the Tenth Circuit therein actually support the Former Fifth Circuit's decision in Summer v. Land & Leisure, et al., 664 F.2d 965 (5th Cir. 1981). The Tenth Circuit in Peterson recounted the principles of the equitable tolling doctrine set forth by the Supreme Court in Bailey v. Glover: "when a plaintiff has been injured by fraud and 'remains in ignorance of it without any fault or want of diligence or care on his part, the bar of the statute [of limitations] does not begin to run until the fraud is discovered.' " 651 F.2d 687 (10th Cir. 1981), citing 21 Wall. (88 U.S.) 342 (1875). The Tenth Circuit noted that the Supreme Court extended the Bailey rule "to statutes borrowed from the states in federal question cases," so that "[t]he borrowed limitations period does not begin to run 'until after [plaintiff] had discovered, or had failed in reasonable diligence to discover, the alleged deception.' " Peterson, at 692, citing Holmberg v. Armbrecht, 327 U.S. 392, at 397, 66 S.Ct. 582, at 585 (1946).

The Tenth Circuit also identified two disparate lines of cases dealing with the issue of summary disposition of federal security regulation claims in which plaintiffs seek to invoke the equitable tolling doctrine. Id., at 692, note 9. After reviewing the origins of the equitable tolling doctrine and the requirement that a plaintiff seeking to invoke the doctrine must have exercised reasonable diligence in the pursuit of federally created remedies, the court stated:

> [5] In view of the equitable origin of the tolling doctrine, we think there remains some room for discretion by the court on the issue of plaintiff's discovery and diligence in cases under

§ 10(b) when the pleadings show that the action would be time-barred but for the equitable doctrine. In the cases where other circuits have affirmed summary judgment on diligence, the district judges have essentially decided the tolling issue in the manner of chancery.[13]

[13] As many authorities have said, the question of whether a plaintiff should have discovered the basis of his suit under the doctrine of equitable tolling does not lend itself to determination as a matter of law. Aldrich v. McCulloch Properties, Inc., supra, 627 F.2d at 1042; 6 L. Loss, Securities Regulation, 3905 (2d ed. Supp. 1969). Nevertheless, trial judges frequently conclude that dismissal in limine is the proper disposition of cases such as this, and such dismissal has often been upheld on appeal. Cases like those cited in footnote 9 supra cannot be adequately explained as individual determinations of law, each on a question of first impression unique to the particular facts of the case. We think that equitable discretion by the trial court is a better explanation.

651 F.2d 687, at 693.

Given the fact that Ohio's 10(b) claim in Peterson alleged substantially the same facts as in a prior litigation, the Tenth Circuit held that:

" . . . summary disposition is appropriate if the documents before the court clearly and convincingly persuade the trial judge that plaintiff in the exercise of reasonable diligence would have discovered the fraud at such time as to bar the action.

"If the documents before the court are not sufficiently persuasive to meet this stringent test, a jury ultimately deciding the facts will determine by a preponderance of the evidence whether

> the action accrued too remotely. We uphold the trial court's order in this case because we find that it was well supported by the record and was not an abuse of discretion. Id., at 694 (footnote omitted).

Notwithstanding the benefit of statutes of limitation to defendants and to the courts, the Tenth Circuit refused to adopt a hard and fast rule in Peterson and confined the trial judge's equitable discretion to summarily dispose of federal securities claims to cases where the documents before the court would clearly and convincingly persuade the trial judge that plaintiff failed to exercise reasonable diligence in discovering the alleged fraud, supra. Moreover, the Tenth Circuit cited a line of cases in which summary judgment was reversed on appeal. Id., at 692. These cases, which the Tenth Circuit distinguished from the facts presented in Peterson, are analogous to this instant case and are treated infra. Respondent in the instant case does not argue that "diligence and the time of discovery are necessarily questions for the jury" and cannot be decided by the court on summary disposition, as did the plaintiff in Peterson. Id. Rather, the facts presented by the instant case are such that summary disposition in this particular case would unfairly terminate any possibility that plaintiff's rights will be vindicated and that the propriety of the actions undertaken by the defendants will be resolved.

Nor can judicial convenience and economy justify the premature extinction of viable claims. Rather, the Tenth Circuit, in declining to apply the rule in Robertson v. Seidman & Seidman, 609 F.2d 583 (2d Cir. 1978); Sperry v. Barggren, 523 F.2d 708 (7th Cir. 1975) and Tomera v. Galt, 511 F.2d 504 (7th Cir. 1975), simply held that the facts presented in the record alleging fraudulent concealment were "insufficient to fool the hypothetical diligent plaintiff and toll the statute." Id., at 694. For the underlying purposes of the federal securities acts would be undermined if all otherwise viable claims were time barred as a matter of law where defendants successfully concealed their fraud long enough for the arbitrary limitations

provision to expire. It was the recognition of the inherent unfairness of such results which prompted the federal courts to adopt the equitable tolling doctrine.

In contrast to Congress' express intent to limit actions against the government brought under FTCA, the 1934 Securities Exchange Act does not provide for a limitations period applicable to private actions. Id., 651 F.2d 687, at 691, citing Ernst & Ernst v. Hochfelder, 425 U.S. 185, 210, n. 29, 96 S.Ct. 1375, 1389 (1976). Defendant's reliance on Kubrick and Peterson, then, fails to give cognizance to the broad remedial purposes behind the SEC regulations, i.e., to protect investors from fraudulent activities in the securities market by requiring disclosure of material facts. For the policy behind the federal securities act was to substitute a philosophy of full disclosure for the philosophy of caveat emptor and thus to achieve a high standard of business ethics in the securities industry." Azalea Meats, Inc. v. Muscat, 386 F.2d 5, at p.9 (5th Cir. 1967), citing GSEC v. Capital Gains Bureau, 375 U.S. 180, 186, 86 S.Ct. 275 at 278 (1963).

"When Congress leaves to the federal courts the formulation of remedial details, it can hardly expect them to break with historic principles of equity," such as the equitable tolling doctrine, "in the enforcement of federally-created equitable rights." Holmberg v. Armbrecht, 327 U.S. 392, at 395, 66 S.Ct. 582, at 584 (1946). The equitable tolling doctrine, which "is read into every federal statute of limitations," has long been utilized by federal courts to assure that the interests of justice are carried out in cases where defendant's own fraudulent activities are used as a defense to time bar an otherwise viable claim. Id., at 585.

> "Equity will not lend itself to such fraud and historically has relieved from it. It bars a defendant from setting up such a fraudulent defense, as it interposes against other forms of fraud. And so this Court long ago adopted as its own the old chancery rule that where a plaintiff has been injured by fraud and "remains

> in ignorance of it without any fault or want of diligence or care on his part, the bar of the statute does not begin to run until the fraud is discovered, though there be no special circumstances or efforts on the part of the party committing the fraud to conceal it from the knowledge of the other party." Id., at 585, citing Bailey v. Glover, 21 Wall. 342, 348, 22 L.Ed. 636.

In the instant case, the complaint raised sufficient questions of facts to justify adjudication on merits of the issues whether want of due diligence by the plaintiff made it unfair to allow Summer to pursue the defendant and whether fraudulent conduct on the part of the defendant may have prevented Summer from being diligent and thus it would be "unfair to bar Summer's appeal to equity because of mere lapse of time." Id., at 584-85.

Against the broad remedial provision of the Truth in Securities Law (as the federal securities are called), defendant offers no counterveiling public interest in time barring the federally-created right of an investor to hold accountable the officers of a publicly-held corporation who have fraudulently concealed the true cause of plaintiff's injury. Rather, defendants rely on the general policy behind statutes of limitation, supra. While Plaintiff Summer acknowledges the utility of statutes of limitations, both to potential defendants and to the courts of developed legal systems, Plaintiff urges this Court to uphold the Fifth Circuit's decision that the policies underlying federal securities regulation, i.e., disclosure and fairness, outweigh any private interests defendants have in avoiding full adjudication of Plaintiff's claims on the merits and a determination of the truth as to the allegations of fraud.

Moreover, many of the auxiliary concerns which statutes of limitations are designed to eradicate are not present in the instant case. Whatever impairment of the judicial truth finding purpose inheres in allowing Plaintiff Summer the opportunity to litigate his claims on their merits, is speculative and most likely will be minimal. (Petitioner's

Brief, p.11, citing Kubrick, 444 U.S. at 111, 122 and 124). To the contrary, if Plaintiff's claims are deemed "time barred," the judiciary itself will have abdicated its truth-finding function in toto. To hold Plaintiff's claim "time barred: would reward Defendants for having effectively concealed their fraudulent activities in direct contravention of the Eleventh Judicial Circuit's order for as long as they did.[1]

In addition, the disparate policies underlying FTCA and federal securities regulations, respectively, supra, Kubrick is distinguished from the instant case in that Kubrick did not dispute that he was aware of his injury and its probable cause in January 1969. Id., at 357. In upholding the general federal rule that "a tort claim accrues at the time of the plaintiff's injury," Id., at 358, the court there held that a plaintiff in Kubrick's position "armed with the facts about the harm done to him, can protect himself by seeking advice in the medical and legal community. To excuse him from doing so by postponing the accrual of his claim would undermine the purpose of the limitations statute, which is to require the reasonably diligent presentation of tort claims against the Government." Id., at 360. The court held that Kubrick did not exercise "all reasonable diligence" and in light of express Congressional intent, ruled that the failure to pursue legal remedies, having knowledge of the cause of his injury, could not be excused. Id., note 10.

The Former Fifth Circuit found that the decline in the price of Land & Leisure stock would not have necessarily put a reasonably diligent investor on notice, as a matter of law, that Defendants had perpetrated fraud which proximately caused the injury done to Summer. Summer v. Land & Leisure, Inc., 664 F.2d 965, at 969 (5th Cir. 1981). First of all, the bulk of Summer's purchases of Land & Leisure stock transpired subsequently to the substantial decline in price, and all of

[1]Summer sued Land & Leisure, Inc. and Robert R. Fischer in order to secure access to the corporation's books and records, Case No. 77-14177. Brief for Petitioners Land & Leisure, Inc. App. 53.

Summer's purchases were made through an underwriter, Raymond James & Associates. Id., at 969. Moreover, the Fifth Circuit reasoned that if Land & Leisure's independent accounting firm, Arthur Young, and the underwriter were not put on notice by the decline in Land & Leisure stock:

> "it is a reasonable inference that it would not have put Summer on notice. We can conceive of several factual situations in which a price decline, under the circumstances here, would not be indicative of fraud in the least, e.g., a depressed real estate market caused either by tight money or recession." Id., at 969.

Yet, even if this Court were to overturn the Fifth Circuit's determination that the decline in price of the Land & Leisure stock would not have put the reasonable investor on notice as to Defendant's fraudulent conduct, the question remains at what point in the random walk of stock market price listings are duly diligent investors charged with knowledge of a conspiracy to defraud for purposes of tolling the borrowed state limitation provisions? The wisdom of the Former Fifth Circuit's adherence to the universally accepted practice that the issue of due diligence in cases where facts bearing thereon are in dispute, as in the instant case, ought not to be disposed of in a summary manner, shines like a beacon in the dark. Id., at 970.

II

THE FORMER FIFTH CIRCUIT'S DECISION THAT THE TOTALITY OF CIRCUMSTANCES PRESENT IN THE INSTANT CASE DID NOT PERMIT DISMISSAL PURSUANT TO RULE 12(b)(6) Fed.R.Civ.P., DOES NOT SO UNFAIRLY REQUIRE DEFENDANTS TO DEFEND AGAINST THE ALLEGATIONS COMPLAINED OF AS TO WARRANT REVIEW BY THIS COURT.

Petitioners in the instant case contend that Summer did not exercise due diligence and that his "stale claim" is time barred. (Brief for Petitioner Land & Leisure, pp.14-15). This is so, Petitioners contend, because "Summer's knowledge in 1971 was as a matter of law, at the very least, sufficient to put him on 'inquiry notice.' " Id., at 16.

Petitioner cites recent circuit court decisions in which the totality of information received by or available to the plaintiff was deemed sufficient to put a reasonable investor on notice that, at the very least, inquiry as to some readily apparent discrepancy should be undertaken. (Brief for Petitioners Land & Leisure, pp.16-17). While the Petitioners correctly state the general principle that an injured plaintiff must exercise due diligence in the pursuit of rights protected by federal securities law, Petitioners' argument that these cases should control the instant case is misguided. (Id., citing, inter alia, Jablon v. Dean Witter & Co., 614 F.2d 677 (9th Cir. 1980).

In Jablon, the Ninth Circuit affirmed the trial court's summary disposition of plaintiff's 10b-5 claim where there were declining stock prices, coupled with a broker's affirmative misrepresentation that the stock in question would rise in value and that there would be both a split and an increase in dividends. Id., at 681, 682. Thus, the Ninth Circuit refused to invoke the equitable tolling doctrine, as plaintiff there requested. And since facts constituting constructive notice afforded plaintiff an opportunity and imposed some duty of inquiry with which the plaintiff had failed to comply, the court in Jablon held plaintiff's claims were time barred. Id.

In affirming the trial court's summary disposition of plaintiff's claims in Jablon, the Ninth Circuit outlined the interrelationship of the two district Federal Rules of Civil Procedure relating to summary disposition. Id., at 682. "A motion under Fed.R.Civ.P. 12(b)(6) to dismiss for failure to state a claim can be granted only if it appears beyond a doubt that plaintiff can prove no set of facts in support of his or her claim." Id., citing Conley v. Gibson, 355 U.S. 41, 78 S.Ct. 99 (1957). The affirmative defense of the statute of limitations may be properly raised by either a motion for dismissal or by summary judgment. Id., at 862. "If the running of the statute is apparent on the face of the complaint, the defense may be raised by a motion to dismiss." Id., citing Graham v. Taubman, 610 F.2d 821 (9th Cir. 1979), Bethel v. Jendeco Construction Co., 570 F.2d 1168, 1174 (3d Cir. 1978), Fuls v. Shastina Properties, Inc., 448 F.Supp. 983, 986 (N.D. Cal. 1978).

"Rule 12(b)(6) Fed.R.Civ.P. permits the court to consider a motion to dismiss accompanied by affidavits as a motion for summary judgment. If the motion is treated as one for summary judgment, all parties shall be permitted to present all materials pertinent to the motion." Id., citing Rule 56 Fed.R.Civ.P. Thus, following the procedure outlined above, the court in Jablon held that, since the plaintiff's own allegations showed she had notice of facts constituting the alleged fraud occurred before 1972, two years before bringing suit, there existed no issue of material fact and therefore defendants were entitled to judgment as a matter of law. Id., citing Poller v. Columbia Broadcasting System, Inc., 386 U.S. 464, 82 S.Ct. 486 (1962); Mutual Fund Investors, Inc. v. Putnam Management Co., 553 F.2d 620 (9th Cir. 1977).

As distinguished from the instant case, Jablon was decided on summary judgment, not a motion to dismiss, Id., at 682. Thus, as the Ninth Circuit pointed out in Jablon, "[w]hen a motion to dismiss is based on the running of the statute of limitations," as in the case at bar, "it can be granted only if the assertions of the complaint, read with the required liberality, would not permit the plaintiff to prove that the statute was tolled." Id., citing Leone v.

Aetna Casualty & Surety Co., 599 F.2d 566 (3d Cir. 1979). Moreover, the subject matter in Jablon concerned marginal accounts, which are a type of loan made by a broker to an investor for a monthly fee, and not the type of securities purchased by Summer. 614 F.2d at 682, note 10. Thus, the very nature of the securities in Jablon provided the plaintiff with actual notice "of her stocks' declining value because she was periodically required to pay margin calls." Id. Lastly, the broker in Jablon made affirmative misrepresentations as to the bright future of the stocks in question and encouraged plaintiff there to purchase additional shares, despite the fact that concurrent price declines contradicted his earlier predictions. Id. In affirming the trial court's decision, the statute of limitations barred Jablon's 10b-5 action, the Ninth Circuit held that "a reasonably prudent person would have realized within two years that Turner's [the broker's] prediction was incorrect." Id., at 682-83.

Similarly, in Buder the Eighth Circuit held that "the defendants in this action have met their burden of establishing, as a matter of law, that the plaintiff's 10b-5 claim is barred by the statute of limitations. 644 F.2d 690, at 692 (8th Cir. 1981). However, the court went on to state that "[t]he Court will refuse to grant summary judgment for the defendants if there is an issue as to when the limitations period began." Id., at 692, citing 10 Wright and Miller, Federal Practice and Procedure, § 2734, n.31 at 651, Dzenitis v. Merrill,Lynch,Pierce,Fenner & Smith, Inc., 494 F.2d 168, 171 (10th Cir. 1974).

Having determined that a two-year limitations period, borrowed from an analogous state securities regulation statute, was appropriate, the Eighth Circuit stated that "[t]he two-year limitations period for plaintiff's 10b-5 claim runs from the date of the discovery of the fraud or from the date the fraud upon reasonable inquiry should have been discovered." Id., citing Vanderboom v. Sexton, 422 F.2d 1233, 1240 (8th Cir. 1970), cert. den., 400 U.S. 852, 91 S.Ct. 47 (1970). "Thus, it is not only the subjective judgment of the defrauded party that is relevant. Commencement of the period is also tested by an objective standard of

diligence on the part of the plaintiff in discovering the fraud." Id., citing (cf.) Fox v. Kane-Miller Corp., 542 F.2d 915 (4th Cir. 1976).

Under the objective standard of due diligence, the Eighth Circuit concurred with the trial court's decision that, given the totality of information available to the plaintiffs, they were not justified in waiting to investigate. Id., at 692-93, citing Turner v. Lundquist, 377 F.2d 44, at 48 (9th Cir. 1967).

> "The facts were such as to "excite inquiry" in Buder; the statutory period "need not await his 'leisurely discovery of the full details' regarding his claim." In re Alodex Corp. Securities Litigation, 392 F.Supp. 672, 684 (S.D. Iowa 1975), aff'd, 533 F.2d 372 (8th Cir. 1976); Klein v. Bower, 421 F.2d 338, 343 (2d Cir. 1970). Id., at 693.

Notwithstanding the findings that the plaintiffs were on inquiry notice, the Eighth Circuit reversed the trial court's denial of plaintiff's motion for leave to amend his complaint as inconsistent with the liberal amendment policy of Rule 15(a) and as an abuse of its discretion. Id., at 694-95.

> In this case, there is significant hardship to the plaintiffs. As a result of the court's ruling, the Buders have been denied a trial on the merits of their fraud claim.
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> On the basis of the record, we cannot say that genuine factual issues are not present as to plaintiffs' right to recover for these alleged misrepresentations.
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> * * * * *

> The district court's decision to deny plaintiff's motion to amend their complaint may have been based, in part, on a perception that the plaintiffs were unlikely to succeed on the merits of their claim. The amendments should be denied on this basis only if they assert clearly frivolous claims or defenses. Id., citing Norbeck v. Davenport Community School District, 545 F.2d 63, at 70; Harvey v. Eimco Corp., 32 F.R.D. 598, 600 (E.D. Pa. 1963) (footnote omitted).

In Townsend v. Columbia Operations, defendant's motion to dismiss pursuant to 12(b)(6) was converted into a motion for summary judgment, as the trial court considered matters extraneous to the pleadings, i.e., four documents which inadvertently were not formally filed with the clerk nor entered into the civil docket. 667 F.2d 844, at 849 (9th Cir. 1982). Nonetheless, the Ninth Circuit held that the four documents in question were "properly used by the district court and were properly made a part of the record." Id. "Once matters outside the pleadings are considered by the court, a Rule 12(b)(6) motion must be treated as a motion for summary judgment." Id., citing (see) Dorado v. Kerr, 454 F.2d 892, 896 (9th Cir. 1972). Plaintiff's fatal mistake in Townsend was the failure to request "the district court to submit 'outside' materials opposing summary judgment." Id., at 850. Having found that "there is no genuine issue as to any material fact," the Ninth Circuit ruled that "defendants are entitled to judgment as a matter of law." Id.

Once an investor has actual knowledge of fraud or is charged with constructive knowledge of fraud, in order to toll the applicable statute of limitations by invocation of the equitable doctrine of fraudulent concealment, he must have remained ignorant of the fraud "without any fault or want of diligence or care on his part." Hupp v. Gray, 500 F.2d 993, at 997 (7th Cir. 1974), citing Bailey v. Glover, 88 U.S. (21 Wall.) 342, 348 (1874). In Hupp, "undisputed facts in the plaintiff's complaint and deposition reveal that Hupp was on notice by March 1967, at the very latest, of the facts from which he should have known of the claimed

fraud." Id., at 996. The Seventh Circuit, relying on their earlier decision in Parrent v. Midwest Rug Mills, Inc., 455 F.2d 123 (7th Cir. 1972), applied the three-year statute of limitations of the Illinois Securities Law (Ill. Rev. Stat. ch 121-1/2, § 137.13D). Id. Since over four years had elapsed between Hupp's last purchase of the securities in question there and the filing of his complaint, the Seventh Circuit affirmed the trial court's summary disposition of his claims. Id. The court chastized Hupp's "narcous" in failing to bring suit earlier, citing Klein v. Bower's often quoted statement that the statutory limitations provision does "not await appellant's leisurely discovery of the full details of the alleged scheme." 421 F.2d 338, 343 (2d Cir. 1970).

The court in Hupp distinguished Dzenitis v. Merrill Lynch Pierce Fenner & Smith, Inc., 494 F.2d 168 (10th Cir. 1974), where the alleged fraud was churning, an activity "not easily recognizable to unsophisticated investors," 500 F.2d 993, at 996, note 3. Rather, Hupp offered no reason for his failure to act affirmatively in determining why his stock "had failed so dismally to live up to Gray's [Hupp's broker's] representations." Id., at 997. The court went on to enumerate factors, in addition to the existence of a fiduciary relationship, which a court should consider in determining whether a particular plaintiff has exercised due diligence: "A court should also consider other factors, including the nature of the fraud alleged, the opportunity to discover the fraud, and the subsequent actions of the defendants." Id., citing Morgan v. Koch, 419 F.2d 993, at 997 (7th Cir. 1969).

CONCLUSION

Defendant Land & Leisure relies on the policy underlying limitation provisions of medical malpractice and tort claims against the federal government to maintain that repose and avoidance of court costs outweigh Plaintiff's right to pursue a federally-created right. Despite the clear intent of Congress to protect investors from the sort of fraud perpetrated by Defendants in the instant case and in the absence of Congressionally imposed limitation provisions in the Securities Exchange Act of 1934, Defendants would have this Court rule that Plaintiff's otherwise viable claim should be dismissed merely because an arbitrary period has expired in which Plaintiff did not discover Defendant's fraud. Thus, Defendants boldly petition this Court for review, despite their efforts to conceal the fraud which gives rise to Plaintiff's cause of action. The interests of justice, which the Federal Rules of Civil Procedure seek to serve, mandate that Plaintiff, at the very least, is entitled to a jury determination of his due diligence in the pursuit of his rights. District Judges, who seek to clear their dockets through summary disposition of valid claims, might otherwise deny reasonably diligent investors their day in court, contrary to the objectives of the federal securities laws. If Congress intended to so curtail its expressed concerns for full disclosure and fairness in securities transactions and to overrule its long, though silent, acquiescence of the judicially created, longstanding equitable tolling doctrine, Congress has at its disposal the means to do so.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing was furnished by mail to JESSE C. JONES, ESQUIRE, Attorney for Petitioner, 1820 One Biscayne Tower, Two South Biscayne Boulevard, Miami, Florida 33131, on this [redacted], 1982.
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